

No. 11137

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. J. REYNOLDS TOBACCO COMPANY,
a Corporation,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY
ANN NEWBY, both minors, by their guardian
ad litem, George H. Newby,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 330

Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division

FILED

OCT 25 1945

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of
Bear Lake

Transcript on Removal

No. 1196

[Filed in U. S. District Court Nov. 9, 1942]

GEORGE H. NEWBY, in his own behalf; RICH-
ARD ARLEN NEWBY, and PATTY ANN
NEWBY, both minors, by their Guardian Ad
Litem, GEORGE H. NEWBY,

Plaintiffs,

vs.

R. J. REYNOLDS TOBACCO COMPANY, L. R.
DONNELLY and RULON D. HAIR,

Defendants.

COMPLAINT

Comes now the plaintiffs and for a cause of action
against the defendants, complain and allege:

I.

That George H. Newby is a widower, the sur-
viving husband of Avenell Newby, and the father
of Richard Arlen Newby and Patty Ann Newby,
the children of Avenell Newby, deceased, and the
plaintiff. That said Richard Arlen Newby is a
minor of the age of approximately eight years, and
Patty Ann Newby is a minor of the age of ap-
proximately six years and that George H. Newby
was, on the 28th day of September, 1942, by order

of the above entitled court, duly made and entered, duly and regularly appointed guardian ad litem for said Richard Arlen Newby and Patty Ann [3] Newby with authority to institute, maintain, and conclude this suit. That the said George H. Newby, Richard Arlen Newby and Patty Ann Newby, minors, are the sole and only heirs at law of the said Avenell Newby, deceased.

II.

That the R. J. Reynolds Tobacco Company, one of the defendants herein is a corporation organized and existing under and by virtue of the laws of the State of North Carolina and doing business in the State of Idaho, as a foreign corporation.

III.

That at all times hereinafter mentioned the defendant L. R. Donnelly was a citizen and resident of the State of Utah with his place of business and residence in Salt Lake City, State of Utah.

IV.

That at all times hereinafter mentioned the defendant, Rulon D. Hair was a citizen and resident of the State of Idaho with his residence and place of business in the City of Pocatello, Bannock County, Idaho.

V.

That the defendant, Rulon D. Hair, at all times hereinafter mentioned was the duly authorized agent, servant, and employee of the defendant, R. J.

Reynolds Tobacco Company and Defendant, L. R. Donnelly, and was at all times hereinafter mentioned engaged in the course, scope, and line of his business for the above mentioned defendants, [4] R. J. Reynolds Tobacco Company and L. R. Donnelly.

VI.

That at all times hereinafter mentioned the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, furnished the defendant Rulon D. Hair, a Chevrolet Panel Truck, bearing State of Idaho, truck license 3A-150 and was used by said Hair in the prosecution of the business of said defendants tobacco company and Donnelly in the line, course, and scope of the employment of said Hair as an employee of said defendant Donnelly and said tobacco company.

VII.

That on the 11th day of September, 1942, at about 4:30 P. M., the deceased, Avenell Newby, was riding as a guest of the defendants in the above described Chevrolet Panel Truck, which at said time and place was being driven and operated by the defendant Rulon D. Hair, while acting within the line, course and scope of his employment as agent, servant or employec of the defendant Donnelly and defendant tobacco company, in a southerly direction on U. S. Highway 30 North at a point about 17 miles North of Montpelier, Idaho; that the said defendant Hair at said time and place negligently,

carelessly, and recklessly and in complete disregard of the rights of others and particularly of the deceased, Avenell Newby, drove said automobile on said highway at an excessive, unreasonable, and dangerous rate of speed, to-wit: 65 miles per [5] hour, while being warned by the deceased not to drive so fast, and then and there swerved back and forth across the road several times and ran off the East side of the road and tipped over, and inflicted divers and serious injuries upon plaintiffs deceased wife, Avenell Newby, from which she died on the 16th day of September, 1942.

VIII.

That by reason of the injuries received by the said deceased, Avenell Newby, at the time and place above mentioned, she was cut, mangled, torn, bruised, lacerated and injured internally to such an extent that as a direct result thereof she died on September 16th, 1942 about five days after said accident.

IX.

That at said time and place the defendant Rulon D. Hair was negligent, careless, and heedless directly, and the defendants Donnelly and Tobacco Company were negligent, careless and heedless through and by said Hair, as their agent, servant, or employee while acting within the line, course and scope of his employment, in the following particulars:

In driving said truck along said highway at an

unreasonable, excessive, dangerous, and unlawful rate of speed, to-wit: 65 miles per hour, in violation of the law of the State of Idaho. In not heeding deceased's warning to not drive so fast; in swerving back and forth across the highway several time; in running off the highway; in not [6] having said truck under such control as to be able to stop and avoid running off the highway and mortally injuring the plaintiff's deceased wife, Avenell Newby.

X.

That one, more, or all of the aforesaid acts of negligence proximately caused the accident and injuries from which plaintiff's wife, Avenell Newby, died.

XI.

That at the time of the above mentioned accident there was in full force and effect in the State of Idaho a statute, 48-504 (8) of the Idaho Code Annotated, (1932) which provides a speed limit of 35 miles per hour on highways and makes it unlawful to exceed this speed limit.

XII.

That the said Avenell Newby was of the age of 28 years; a strong, healthy woman, capable of making a home and doing the housework for the plaintiff George Newby and their minor children. Richard Arlen Newby and Patty Ann Newby, had she lived. That she was a kind and friendly person

and was devoted to her family. That the minor children were dependent upon her for their care and guidance. That by reason of her death her husband, George H. Newby, has lost the love, comfort, and companionship of a devoted wife. That the minor children, Richard Arlen Newby and Patty Ann Newby, have lost the love, comfort, and care and [7] companionship that only their mother could give to the damage of the said George H. Newby and Richard Arlen Newby and Patty Ann Newby in the sum of \$100,000.00. That by reason of the injuries resulting in the death of the deceased, Avenell Newby, expenses were incurred for medical services in the amount of \$115.00 and for funeral and burial services in the amount of \$268.20.

Wherefore, the plaintiff, George H. Newby on his own behalf and as guardian ad litem for Richard Arlen Newby and Patty Ann Newby, prays for damages against the defendants and each of them for the amount of One Hundred Thousand Dollars general damages, and \$115.00 for medical services and \$268.20 funeral and burial expenses; for their costs of suit herein expended and for such other and further relief as may be found just and equitable in the premises.

GLENN A. COUGHLAN,

Attorney for Plaintiffs.

Residence and Post Office Address: Montpelier,
Idaho.

(Duly Verified.)

[Endorsed]: Filed September 29, 1942. [8]

[Title of Court and Cause in State Court.]

PETITION FOR AN ORDER APPOINTING
GUARDIAN AD LITEM OF RICHARD
ARLEN NEWBY AND PATTY ANN
NEWBY, BOTH MINORS.

Your petitioner respectfully represents:

I.

That Richard Arlen Newby is a minor of the age of approximately eight years, and that Patty Ann Newby is a minor of approximately six years, children of George H. Newby, petitioner herein.

II.

That in the 16th day of September, 1942, Avenell Newby, the mother of Richard Arlen Newby and Patty Ann Newby was killed while riding as a guest of Rulon D. Hair, while he was in the line, course, and scope of his employment for L. R. Donnelly and the R. J. Reynolds Tobacco Company, in an automobile operated and driven by the said Rulon D. Hair.

III.

That your petitioner believes and therefore alleges that said Richard Arlen Newby and Patty Ann Newby have a good cause of action against the R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair.

Wherefore, your petitioner prays that the court enter an order appointing your petitioner as guardian ad litem of the said Richard Arlen

Newby and [9] Patty Ann Newby for the purpose of instituting and maintaining a suit for damages against the said Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair.

GEORGE H. NEWBY,
Petitioner.

(Duly verified.)

[Endorsed]: Filed Sept. 29, 1942.

[Title of Court and Cause in State Court.]

ORDER APPOINTING GUARDIAN
AD LITEM

Upon reading and filing the petition of George H. Newby filed herein, wherein it is prayed that George H. Newby be appointed guardian ad litem for Richard Arlen Newby and Patty Ann Newby, minors; and it appearing to the undersigned Judge of the above entitled Court that George H. Newby is a competent and responsible person, and that it is expedient that he be appointed to represent said minors for the purpose of instituting, maintaining and concluding a suit against R. J. Reynolds Tobacco Company, a corporation, L. R. Donnelly and Rulon D. Hair, as outlined in said petition;

Now, Therefore, It Is Ordered that the said George H. Newby be and he is hereby appointed guardian ad litem for the said Richard Arlen Newby and Patty Ann Newby, and it is further ordered

that said George H. Newby as such guardian ad litem be and he is hereby authorized and [10] directed to institute, prosecute and conclude said action referred to in said petition on behalf of said Richard Arlen Newby and Patty Ann Newby, minors.

Dated this 28th day of September, 1942.

ISAAC McDOUGALL,

District Judge.

[Endorsed]: Filed Sept. 28, 1942.

[Title of Court and Cause in State Court.]

ORDER FOR REMOVAL

This cause coming on regularly for hearing upon petition and bond of the defendants R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, herein, for an order transferring this cause to the United States District Court for the District of Idaho, Eastern Division; and

It Appearing to the Court that said defendants R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair have filed their petition herein for such removal in due form of law, and that they have also filed their bond duly conditioned with good and sufficient surety, as provided by law, and that said defendants have given plaintiffs due and regular notice thereof; and that all of said papers were duly filed before the time for said defendants to appear had expired, and

It Further Appearing to the Court that this is a proper cause for removal to the United States [11] District Court for the District of Idaho, Eastern Division;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that said petition and bond be, and the same are hereby accepted and approved, and that the above entitled cause be, and the same is hereby removed to the United States District Court for the District of Idaho, Eastern Division, and that all further proceedings in this court be stayed and the clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bear Lake County, is hereby directed to make up the record in said cause and submit the same to the United States District Court for the District of Idaho, Eastern Division, on or before thirty days from the date of the filing of said petition.

Dated this 26th day of October, 1942.

ISAAC McDOUGALL

District Judge.

[Endorsed]: Filed Oct. 26, 1942.

[Title of Court and Cause.]

MOTION TO DISMISS AND TO MAKE MORE
DEFINITE AND CERTAIN

Come Now, The defendants, Reynolds Tobacco Company and L. R. Donnelly, and each of them, and move the court to dismiss the above entitled action upon the ground that the complaint fails to

[12] state a claim upon which relief can be granted against them, or either of them.

Said defendants, and each of them, further move the court that if said motion to dismiss be not granted them, then and in that event the plaintiffs be required to make a more definite statement of the alleged negligence of the defendant, Rulon D. Hair; also the manner in which it will be contended said Rulon D. Hair recklessly drove said automobile upon the highway, and of what said alleged reckless conduct actually consisted, and what it will be contended he did, which constituted reckless disregard of the rights of the deceased.

Dated November 14, 1942.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.

(Affidavit of Service Attached.)

[Endorsed]: Filed Nov. 14, 1942. [13]

[Title of Court and Cause.]

MOTION TO DISMISS AND MAKE MORE
DEFINITE AND CERTAIN

Comes now the defendant Rulon D. Hair, and moves the Court to dismiss the above entitled action upon the grounds that the complaint fails to state a

claim against this defendant upon which relief can be granted against him.

Said defendant further moves the court that if said Motion to Dismiss be not granted, then, and in that event, said defendant moves that the plaintiffs be required to make a more definite statement of the alleged negligence of the defendant and the manner in which it will be contended that the defendant Rulon D. Hair recklessly drove said automobile upon the highway and of what said reckless conduct actually consisted and that which it will be contended he did which constituted disregard of the rights of the deceased.

Dated this 14th day of November, 1942.

ROY L. BLACK &

JOHN R. BLACK

Attorneys for Defendant

Rulon D. Hair

Residing at Pocatello, Idaho.

(Affidavit of Mailing Attached.)

[Endorsed]: Filed Nov. 16, 1942. [14]

[Title of Court and Cause.]

MINUTES OF THE COURT

February 6, 1943

This cause came on for hearing on motions to dismiss and motion for a more definite statement in the complaint. Glenn A. Coughlin, Esquire, appeared for the plaintiffs and Messrs. E. B. Smith and A. L. Merrill, Esquires, appeared for the de-

fendant Reynolds Tobacco Company and R. L. Donnelly. On agreement between counsel for the plaintiff and attorneys for the defendant Rulon D. Hair, the motions of defendant Hair were submitted to the Court upon the argument presented by counsel for the other defendants.

After hearing argument of counsel, it was ordered that the motions to dismiss and to make more definite and certain by the defendants R. J. Reynolds Tobacco Co. and Rulon D. Hair, and each of them, is denied. Exceptions were allowed to each of the defendants and twenty-five days were granted for filing of answer to complaint.

[Title of Court and Cause.]

ORDER ON MOTIONS

The motions of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and of the defendant Rulon D. Hair to dismiss and to make more definite and certain were argued before the Court the 6th day of February, 1943 at Boise, [15] Idaho, pursuant to agreement of counsel for the respective parties to this cause. Mr. Glenn A. Coughlan appeared for the plaintiff and Messrs. E. B. Smith and A. L. Merrill appeared for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly. Pursuant to agreement between the attorney for the plaintiffs and the attorneys for the defendant Rulon D. Hair, the motions of Rulon D. Hair were submitted to the Court upon argument

of counsel for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly.

After hearing argument of the respective counsel on the motions, and the Court having duly considered the same and being fully advised in the premises;

It Is Hereby Ordered And This Does Order, That the motions to dismiss and to make more definite and certain of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and of the defendant Rulon D. Hair are, and each of them hereby is, denied.

Exceptions to the ruling of the Court are hereby granted to each and all of the defendants. Upon stipulation of counsel for the respective parties in open court it is hereby furthered ordered that the defendants and each of them be, and they are hereby granted twenty-five days from date hereof within which to prepare, serve and file their respective answers in this cause. [16]

Dated this 6th day of February, 1943.

LLOYD L. BLACK,

United States District Judge.

Presented by Glenn A. Coughlan, Counsel for plaintiffs.

GLENN A. COUGHLAN,

Attorney for Plaintiffs.

O.K. as to form

A. L. MERRILL

E. B. SMITH

[Endorsed]: Filed Feb. 6, 1943.

[Title of Court and Cause.]

DEMAND FOR JURY TRIAL

To R. J. Reynolds Tobacco Company, R. J. Donnelly, and Rulon D. Hair, and Their Attorneys, E. B. Smith, A. L. Merrill of Merrill & Merrill and Roy L. Black of Black & Black:

Demand is hereby made by the plaintiffs in the above entitled cause for jury trial in the above entitled cause. Dated February 15, 1943.

GLENN A. CAUGHLAN,
Attorney for Plaintiff
Montpelier, Idaho.

[Service Acknowledged]

[Endorsed]: Filed Feb. 25, 1943. (17)

[Title of Court and Cause.]

MINUTES OF THE COURT

March 26, 1943

The plaintiffs' motion for leave to amend the complaint herein came on for hearing before the [18] Court. Counsel for the respective parties being present.

After hearing argument of B. W. Davis, Esquire, on the part of the plaintiff and A. L. Merril, Esquire, on the part of the defendants, the Court took the motion under advisement.

[Title of Court and Cause.]

MINUTES OF THE COURT

March 27, 1943

The Court announced his conclusions on the plaintiffs' petition to amend the complaint, and leave was granted to the plaintiff to make such amendment. The defendants asked and were granted exceptions.

The defendants were granted twenty days in which to answer the complaint as amended.

It was ordered that the setting of trial of the same be, and the same hereby is vacated, and the case is continued for the term.

[Title of Court and Cause.]

MINUTES OF THE COURT

March 30, 1943

The plaintiffs' notice of submitting proposed order, filed March 29th, 1943, was withdrawn by B. W. Davis, Esquire. [19]

[Title of Court and Cause.]

MOTION

Comes now the plaintiffs by and through their attorneys of record, and move the Court for an order permitting the filing of an amended complaint herein.

That said proposed amended complaint is attached hereto.

GLENN A. COUGHLAN

Res. & P. O. Address,
Montpelier, Idaho

B. W. DAVIS

Res. & P. O. Address,
Pocatello, Idaho.

Attorneys for Plaintiffs.

[Endorsed]: Filed April 5, 1943. [20]

[Title of Court and Cause.]

MINUTES OF THE COURT

April 9, 1943

The plaintiffs' motion for leave to file an amended complaint was presented to the Court, together with the objections filed. It was ordered that the motion be, and the same hereby is granted and proposed amended complaint submitted with the motion be filed. The defendants were granted twenty days in which to plead. [21]

[Title of Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiffs and for a cause of action against the defendants, complain and allege:

I.

That George H. Newby is a widower, the surviving husband of Avenell Newby, and the father of Richard Arlen Newby, age eight years and Patty Ann Newby, age six years, the minor children of Avenell Newby, deceased and the plaintiff; that he was, on the 28th day of September, 1942, by order of the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake, duly made and entered, duly and regularly appointed guardian ad litem for said Richard Arlen Newby, and Patty Ann Newby, with authority to institute, maintain and conclude this suit. That the said George H. Newby, Richard Arlen Newby and Patty Ann Newby, minors, are the sole and only heirs at law of the said Avenell Newby, deceased.

II.

That the R. J. Reynolds Tobacco Company for several years immediately prior to the filing of this complaint, has been and now is a corporation organized and existing under the laws of the State of North Carolina and doing business in the State of Idaho as a foreign corporation without having [22] complied with the laws of Idaho relating to foreign corporations qualifying to do business in said State.

III.

That at all times hereinafter mentioned the defendant, L. R. Donnelly, was a citizen and resident of the State of Utah with his place of business and residence in Salt Lake City, State of Utah.

IV.

That on the 11th day of September, 1942 and at the time of the filing of plaintiffs' complaint in the District Court of the County of Bear Lake, Idaho, on or about the 28th day of September, 1943, the defendant, Rulon D. Hair was a citizen and a resident of the State of Idaho.

V.

That the defendant, Rulon D. Hair, at all times hereinafter mentioned was the duly authorized agent, servant and employee of the defendant, R. J. Reynolds Tobacco Company, and the defendant, L. R. Donnelly and was at all times hereinafter mentioned engaged in the course, scope and line of his business for the above mentioned defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.

VI.

That at all times hereinafter mentioned the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were the owners of and furnished to the defendant, Rulon D. Hair, a Chevrolet Panel [23] Truck, bearing State of Idaho truck license 3A-150, which was used by said Hair in the prosecution of the business of said defendants in the line, course, and scope of the employment of said Hair as an employee of said defendants.

VII.

That at all times herein mentioned the said defendant, Rulon D. Hair had permission and authority from the said R. J. Reynolds Tobacco Company

and L. R. Donnelly, to use and operate said Chevrolet Panel truck upon the public highways of the State of Idaho, notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instruction.

VIII.

That on the 11th day of September, 1942, on the public highway known as U. S. Highway No. 30 North, at a point on said highway about seventeen miles north of Montpelier, Idaho, the said Rulon D. Hair, with a reckless disregard of the rights of others and of Avenell Newby, so recklessly drove and operated the said panel truck hereinabove referred to that the same ran off the said highway, tipped over and inflicted serious injuries upon said Avenell Newby from which she died on the 16th day of September, 1942, and at said time and place said Avenell Newby was riding with Rulon D. Hair as his guest and was a guest of the defendants herein. [24]

IX.

That the said Avenell Newby was of the age of twenty-eight years; was a strong, healthy women, capable of making a home and doing the housework for the plaintiff, George H. Newby and their minor children, Richard Arlen Newby and Patty Ann Newby, had she lived. That she was a kind and friendly person and was devoted to her family. That the minor children were dependent upon her

for their care and guidance. That by reason of her death, her husband, George H. Newby, has lost the love, comfort and companionship of a devoted wife. That the minor children, Richard Arlen Newby and Patty Ann Newby have lost the love, comfort and care and companionship that only their mother could give, to the damage of the said George H. Newby and Richard Arlen Newby and Patty Ann Newby, in the sum of \$100,000. That by reason of the injuries resulting in the death of the deceased, Avenell Newby, expenses were incurred for medical services in the amount of \$115.00, and for funeral and burial services in the amount of \$268.20.

Wherefore, the plaintiff, George H. Newby on his own behalf and as guardaian ad litem for Richard Arlen Newby and Patty Ann Newby, prays for damages against the defendants and each of them for the amount of One Hundred Thousand Dollars general damages, and \$115.00 for medical services and \$268.20 funeral and burial expenses; for their costs of suit herein expended and for such other and [25] further relief as may be found just and equitable in the premises.

GLENN A. COUGHLAN

Res. & P. O. Address: Montpelier, Idaho

B. W. DAVIS

Res. & P. O. Address: Pocatello, Idaho

Attorneys for Plaintiffs.

[Endorsed]: Filed April 9, 1943.

[Title of Court and Cause.]

MOTION TO DISMISS, MOTION FOR MORE
DEFINITE STATEMENT, AND MOTION
TO STRIKE DIRECTED TO AMENDED
COMPLAINT

Come now defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, and each of them, and moves the court as follows:

1. To dismiss the action because the amended complaint fails to state a claim against these defendants or either of them upon which relief can be granted;

2. To dismiss the action because the amended complaint shows upon its face lack of jurisdiction of the court over the persons of Richard Arlen Newby, and Patty Ann Newby, minors, and each of them, because (a) there is no general guardian who appears for or on behalf of either of said minors, (b) [26] there is no guardian ad litem appointed pursuant to Rule 9 and 58 of the Rules of the Practice of the United States District Court for the District of Idaho, and George H. Newby, who purports to appear as guardian ad litem for said minors is not qualified, pursuant to the rules aforesaid, to act in such capacity.

3. Without waiving the foregoing motions, but expressly relying thereon, these defendants and each of them, further moves the court to require plaintiffs to make a more definite statement of their purported cause of action as follows:

(a) State what relationship plaintiffs will con-

tend existed between R. J. Reynolds Tobacco Company and L. R. Donnelly and the manner in which and the reason for Rulon D. Hair acting as agent of both of said defendants at the times and in the manner alleged in Paragraph V of said amended complaint, and more particularly what type of service it will be contended said Rulon D. Hair was rendering that would enable him to act within the course, scope and line of business or claimed agency of said defendants, either jointly or severally, at the times mentioned in said amended complaint;

(b) State what particular acts referred to in Paragraph VII of said amended complaint which it is inferred were committed by Rulon D. Hair and the times of their commission and the character thereof, and which plaintiffs contend came to the knowledge of R. J. Reynolds Tobacco Company and L. R. Donnelly by virtue whereof plaintiffs claim these defendants, and each of them, knew that Hair [27] was a careless, reckless and incompetent driver of an automobile; also the particular "instructions" which it is alleged were violated in the charge that Rulon D. Hair was in the habit of hauling guests;

(c) State the particular acts which plaintiffs will contend constituted a reckless disregard of the rights of others and of Avenell Newby, and the acts which plaintiffs will contend constituted reckless driving and operation of said panel truck as alleged, and at the time alleged, in Paragraph VIII of said complaint.

4. Upon the ground that the same is immaterial, these defendants move to strike from said amended complaint the following:

(a) All that portion of Paragraph numbered II reading as follows:

“and doing business in the state of Idaho as a foreign corporation without having complied with the laws of Idaho relating to foreign corporations qualified to do business in said state.”

(b) All that portion of Paragraph numbered VII reading as follows:

“Notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions.”

These motions are made individually and separately but consolidated pursuant to Rule 12 (g)

Wherefore, defendants pray said motions and each of them be granted and said defendants be given the relief sought thereby.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendants R.

J. Reynolds Tobacco Company and L. R. Donnelly

(Service Acknowledged)

[Endorsed]: Filed April 26, 1943. [29]

[Title of Court and Cause.]

ORDER

On April 26, 1943, defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, filed their motion to dismiss; motion for more definite statement and motion to strike, directed to the amended complaint.

The matter was fully presented by briefs, filed by respective counsel, and the Court being advised, it is Ordered that:

The motion to dismiss is denied.

The motion for more definite statement is denied.

The motion to strike is sustained as to the following portion of paragraph II of the amended complaint: "without having complied with the laws of Idaho relating to foreign corporations qualified to [30] do business in said state." As to all other portions the motion is denied.

Dated this 6th day of July 1943.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed July 6, 1943.

[Title of Court and Cause].

ANSWER OF R. J. REYNOLDS TOBACCO
COMPANY and L. R. DONNELLY TO
AMENDED COMPLAINT.

Come now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the defendants in the [31] above-entitled cause, and, for answer to the complaint of the plaintiffs on file herein, admit, deny and allege as follows:

FIRST DEFENSE

That the amended complaint fails to state a claim against these answering defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

I.

These defendants deny each and every allegation of said amended complaint not hereinafter specifically admitted.

II.

Answering paragraph numbered I of said amended complaint, these defendants admit the allegations contained therein, save and except defendants deny that George H. Newby was duly and regularly appointed guardian ad litem for Richard Arlen Newby and Patty Ann Newby, and denies the legal effect alleged of the order pleaded in said paragraph.

III.

Answering paragraph numbered II of said amended complaint, these defendants admit that

the R. J. Reynolds Tobacco Company for several years immediately prior to the filing of said complaint has been, and that it now is, a corporation organized and existing under the laws of the State of North Carolina, but deny the remaining allegations of said paragraph. [32]

IV.

These defendants admit the allegations contained in paragraph numbered III of said amended complaint.

V.

Answering paragraph numbered IV of said amended complaint, these defendants deny the allegations contained therein, and allege in this respect that on the date of the filing of the original complaint in the District Court of Bear Lake County, State of Idaho, to wit: on or about the 28th day of September, 1942, the defendant Rulon D. Hair was, and for some time prior thereto had been, and now is, a bona fide resident and citizen of the State of Utah.

VI.

Answering paragraph numbered V of said amended complaint, these defendants deny each and every allegation contained therein. Further answering said paragraph, defendants allege that the said Rulon D. Hair had been acting as a salesman for the R. J. Reynolds Tobacco Company prior to the 11th day of September, 1942, but was not so acting on said date and was not acting as an agent, servant or employee of these defendants or either of them,

or in any other capacity, with reference to any of the matters or things alleged in said amended complaint, and none of said alleged acts were committed by the said Rulon D. Hair within the course, scope or line of any agency, business or employment by or for the R. J. Reynolds Tobacco Company or L. R. Donnelly, and for which acts, if any were committed, [33] neither the said R. J. Reynolds Tobacco Company or the said L. R. Donnelly are in anywise liable.

VII.

Answering paragraph numbered VI of said amended complaint, these defendants deny each and every allegation contained therein. Further answering said paragraph, however, defendants allege that the Chevrolet Panel Truck therein described was the property of R. J. Reynolds Tobacco Company, but that it was not used by the said Rulon D. Hair at the time of the matters and things alleged in said complaint in the prosecution of any business or agency of these answering defendants or either of them, or as agent, servant or employee of either of said defendants, and its use at such time and for the purposes alleged in said complaint was without right or permission of these answering defendants, and they are in no wise responsible for any damages, if any occurred, as the result thereof.

VIII.

Answering paragraph numbered VII of said amended complaint, these defendants admit that Rulon D. Hair had permission and authority to use

and operate said Chevrolet Panel Truck when actually engaged in the business of the company, but deny that he was so engaged on the 11th day of September, 1942, and deny that these defendants, or either of them, knew that the said Rulon D. Hair was a careless, reckless or incompetent driver of an automobile or that he was in the habit of hauling [34] guests in said car. In this respect defendants further deny that the said Rulon D. Hair was a careless, reckless or incompetent driver of an automobile, and deny that he hauled guests therein. These defendants allege that the said Rulon D. Hair had been given instructions not to haul or carry guests in said automobile or panel truck, and further allege that if there has been an infraction of this instruction, the same was without the knowledge or consent of these answering defendants or either of them. Defendants deny each and every other allegation contained in said paragraph.

IX.

Answering paragraph numbered VIII of said amended complaint, these defendants admit that on the 11th day of September, 1942 on a public highway, known as U. S. Highway #30 North, at a point on said highway about 17 miles north of Montpelier, Idaho, the defendant Rulon D. Hair, while driving said Panel Truck, ran off the highway, tipped over, and that certain injuries were inflicted upon Avanell Newby, and admits that Avanell Newby died on the 16th day of September, 1942, but deny each and every other allegation contained in

said paragraph. Further answering said paragraph, these defendants allege that if the said AvaneU Newby was riding in said Panel Truck as the guest of Rulon D. Hair or with his consent, the same was without the consent or permission of these answering defendants or either of them, and contrary to positive instructions theretofore given the said Rulon [35] D. Hair, and if the said Rulon D. Hair transported the said AvaneU Newby in said Panel Truck as a guest or otherwise, the same was without authority of these defendants, and without the scope of his employment, and for the consequence of which neither of these answering defendants are liable.

X.

Answering paragraph numbered IX of said amended complaint, these defendants admit that AvaneU Newby was of the approximate age of 28 years. Defendants deny that by reason of her death the plaintiffs have been damaged in any sum or amount whatever, by reason of any act or omission on the part of these defendants or either of them. Defendants are without knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph, and upon this ground deny each and every other allegation contained therein.

THIRD DEFENSE

Further answering said amended complaint, and as an additional defense thereto, these defendants allege that any injuries which the said AvaneU Newby may have received in the accident described

in the amended complaint and the damages to the plaintiffs, if any, resulting therefrom were proximately caused or contributed to by the negligence and carelessness of the said Avaneil Newby, who was then and there guilty of contributory negligence and said injuries were not the result of negligence or want of care on the part of any of the defendants charged in said amended complaint. [36]

FOURTH DEFENSE

Further answering said amended complaint, and as a separate and further affirmative defense thereto, these defendants allege that at the time and place mentioned in said amended complaint the said Avaneil Newby was, and for some time prior thereto had been, riding in said panel truck as a gratuitous guest of Rulon D. Hair and at her special request; that she had been with the said Rulon D. Hair for a number of hours prior to said accident and all matters and things touching said association and the operation of said panel truck by the said Rulon D. Hair were fully known to her and freely acquiesced in by her, and having such information she continued to ride in said panel truck and acquiesced in each and everything done with respect thereto, and of said association, and the driving of said panel truck, and with such knowledge and acquiescence on her part and the riding in said truck with the said Rulon D. Hair at her own request and as his gratuitous guest she thereby assumed all risk attendant thereon and by reason of her acquiescence and of her own conduct no recovery can be had for

any damages, if any, which may have resulted from the accident alleged in said amended complaint.

FIFTH DEFENSE

Further answering said amended complaint and as a separate and further affirmative defense thereto, these defendants allege that the injuries which Avaneil Newby may have sustained, and the [37] damages thereby suffered, if any, by the plaintiffs were the result of matters and things over which the driver of said automobile had no control, and said accident occurred without fault on his part and without fault, liability or responsibility of any kind whatever on the part of these answering defendants.

Wherefore, these defendants pray that plaintiffs take nothing by reason thereof, and that defendants recover their costs incurred herein.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds
Tobacco Company
and L. R. Donnelly

(Duly verified.)

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, hereby demand a trial by jury.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendants R.
J. Reynolds Tobacco Com-
pany and L. R. Donnelly

(Service Acknowledged.)

[Endorsed]: Filed July 15, 1943. [38]

[Title of Court and Cause].

ANSWER OF DEFENDANT RULON D. HAIR

Comes now the defendant Rulon D. Hair and for answer to plaintiffs' Amended complaint this defendant admits, denies and alleges as follows:

I

That said amended complaint fails to state a claim or cause of action against this answering defendant upon which relief can be granted to plaintiffs or either or any of them.

SECOND DEFENSE

I

This defendant denies each and every allegation of said complaint not herein specifically admitted.

II

Answering paragraph I of the Amended Complaint this defendant admits the allegations thereof.

III

Answering paragraph II of the amended complaint this defendant admits that defendant R. J. Reynolds Tobacco Company, for several years immediately prior to the filing of this amended complaint, has been and now is a corporation but denies each and every other allegation of said paragraph II.

IV

Answering paragraph III of the amended complaint this defendant admits the allegations thereof. [39]

V

Answering paragraph IV of said amended complaint this defendant denies each and every allegation thereof and further answering said paragraph IV of said amended complaint this defendant alleges the fact to be that at the time of the filing of the complaint herein this defendant was and ever since said time has been and now is a citizen of and a resident of the State of Utah.

VI

Answering paragraph V of said amended complaint this defendant admits that prior to the accident mentioned in the complaint he had been an employee of the said defendant R. J. Reynolds To-

bacco Company, a corporation, as a salesman, and this defendant denies each and every other allegation of said paragraph.

VII

Answering paragraph VI of said amended complaint this defendant admits that at the times mentioned in the amended complaint defendant R. J. Reynolds Tobacco Company furnished to this defendant a Chevrolet Panel Truck, bearing State of Idaho Truck License #3A-150 which was used by this defendant in the prosecution of his business and in his capacity as employee and salesman for said defendant R. J. Reynolds Tobacco Company and defendant denies each and every other allegations of said paragraph VI. [40]

VIII

Answering paragraph VII of said complaint this defendant admits that at the times herein mentioned he had permission and authority from the defendant R. J. Reynolds Tobacco Company to use and operate said Chevrolet Panel Truck upon the public highways of the State of Idaho in the carrying on of his business as employee and salesman for said defendant R. J. Reynolds Tobacco Company and this defendant denies that this defendant was a careless, or that he was a reckless or that he was an incompetent driver of an automobile and denies each and every other allegation of said paragraph.

IX

Answering paragraph VIII of said amended complaint this defendant admits that on to-wit: The 11th day of September, 1942, on the public highway known as U. S. Highway #30 N at a point about seventeen miles north of Montpelier, Idaho, the said truck, ran off the said highway, tipped over and inflicted injuries upon said Avanell Newby and that at said time and place said Avanell Newby was riding with this defendant but denies each and every other allegation of said paragraph.

Further answering said allegations defendant alleges that said Avanell Newby was riding in said truck with said defendant at her own request and instance and without any invitation from this defendant and said Avanell Newby having requested the defendant to permit her to ride with him to Montpelier, Idaho and that she was so riding with [41] the defendant at the time of the said accident alleged in the amended complaint.

X

Answering paragraph IX of said amended complaint this defendant admits that the said Avanell Newby was of about the age of 28 years; denies each and every other allegation of said paragraph IX; this defendant specifically denies that said George H. Newby, Richard Arlen Newby and Patty Ann Newby have been damaged in any sum or amount whatever by reason of any act or omission on the part of this defendant.

THIRD DEFENSE

Further answering said Amended Complaint and as an additional defense thereto this defendant alleges:

I

That any injuries which the said Avaneil Newby may have received in the accident described in the Amended Complaint and the damages to plaintiffs, if any, resulting therefrom, were proximately caused or contributed to by the negligence of said Avaneil Newby who was then and there guilty of contributory negligence and that the said injuries were not the result of negligence or want of care on the part of this defendant.

FOURTH DEFENSE

Further answering the said Amended Complaint and as a further, separate and affirmative defense thereto this defendant alleges: [42]

That at the time and place mentioned in said amended complaint the said Avaneil Newby was, and for some time prior thereto had been, riding in said automobile with this defendant as a gratuitous guest of this defendant and solely at and by her own request, and that all matters and things touching said truck and the operation of said truck or automobile by this defendant, as the same was being operated, were fully known to the said Avaneil Newby, and, having such information, she continued to ride in said automobile truck and acquiesced in and joined with this defendant in each and everything done with respect thereto, and with respect

to the driving of the said automobile as then being driven by this defendant and with such knowledge and acquiescence and her riding in said automobile truck with this defendant solely at her own request and instance and as a gratuitous guest, she thereby assumed all risk attendant thereon and by reason whereby no recovery can be had for any damages, if any, which may have resulted to her or to any of the plaintiffs from the said accident alleged in the amended complaint.

FIFTH DEFENSE

Further answering said Amended Complaint and as a further defense thereto this defendant alleges that the injuries which the said Avanell Newby may have sustained and any damages suffered by the plaintiffs herein, were the result of matters and things over which this defendant had no control and the said accident occurred without fault, without [43] carelessness and without negligence on the part of this defendant.

Wherefore, having fully answered said Amended Complaint this defendant prays that plaintiff take nothing by reason thereof and this defendant recover his costs incurred herein.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant Ru-
lon D. Hair. Residence:
Pocatello, Idaho.

Defendant Rulon D. Hair hereby demands a trial by jury.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant Rulon D. Hair, Residence:
Pocatello, Idaho.

(Duly verified.)

(Service Acknowledged)

[Endorsed]: Filed July 15, 1943.

[Title of Court and Cause].

MINUTES OF THE COURT

August 18, 1943

The plaintiffs' Motion to Strike from the Answers of the several defendants and all objections to interrogatories by the respective parties came on for [44] hearing before the Court. Glenn A. Coughlan, Esquire, appeared as counsel for the plaintiffs and E. B. Smith, Esquire, appeared for all the defendants except Rulon D. Hair.

On Motion by plaintiffs' counsel and with consent of counsel for the defendants, the Court granted leave to amend the Motion to Strike by interlineation.

On stipulation of counsel the Motions as regard to the defendant Rulon D. Hair, were submitted without argument.

The Court heard argument of respective counsel on the Motion to Strike from the Answer of the defendants R. J. Reynolds Tobacco Co. and L. R. Donnelly, and also the objection to interrogatories and took the same under advisement.

The Court ordered that all interrogatories, that may be sustained by the Court, be answered by the respective parties to whom they are directed by September 15, 1943. [45]

[Title of Court and Cause].

VERDICT

We, the jury in the above entitled cause, find for the plaintiffs, and against the defendants, R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, and fix plaintiffs' damages against said defendants at the sum of \$7500.00.

MERLE A. MILLER

Foreman

[Endorsed]: Filed Oct. 23, 1943. [46]

[Title of Court and Cause.]

JUDGMENT ON VERDICT

This matter having come on regularly for trial to a jury which has returned its verdict herein.

Now, Therefore, It Is Ordered, Adjudged, and Decreed, That plaintiffs have and recover of and from the said defendants, jointly and severally, the sum of Seven Thousand Five Hundred Dollars

(\$7,500.00) damages, together with plaintiffs' costs and disbursements incurred herein assessed in the sum of \$89.40.

Witness, The Honorable Chase A. Clark, Judge of the above entitled Court, and the seal thereof, this 23rd day of October, 1943.

[Seal]

W. D. McREYNOLDS

Clerk

[Endorsed]: Filed Oct. 23, 1943. [47]

[Title of Court and Cause.]

MINUTES OF THE COURT

January 5, 1944

This cause came on for hearing at this time, upon agreement of counsel for all parties to the action, on the Motions for judgment notwithstanding verdict, and, in the alternative, for a new trial.

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were represented by E. B. Smith, Esquire, who made oral argument on behalf of said defendants. The defendant Rulon D. Hair appeared by letter of his counsel, Messrs. Black and Black; and the plaintiff's counsel presented the plaintiff's resistance to said motions on brief.

The Court, being fully advised in the premises, announced his conclusions, and ordered that both Motions for judgment regardless of verdict and Motion for new trial be, and the same hereby are,

denied. All defendants were granted exceptions to the Order. [48]

[Title of Court and Cause.]

NOTICE OF APPEAL BY R. J. REYNOLDS
TOBACCO COMPANY AND L. R. DON-
NELLY.

Notice Is Hereby Given That R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, two of the defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment made and entered in the above entitled court and cause on the 23rd day of October, 1943, which said judgment is in favor of the plaintiffs above named and against these two appealing defendants, and each of them; also against one Rulon D. Hair.

Dated this 20th day of January, 1944.

E. B. SMITH

Residence: Boise, Idaho,

A. L. MERRILL,

R. D. MERRILL,

Residing at Pocatello, Idaho,
Attorneys for said defend-
ants, R. J. Reynolds To-
bacco Company and L. R.
Donnelly.

[Endorsed]: Filed Jan. 20, 1944. [49]

[Title of Court and Cause.]

COST BOND ON APPEAL OF R. J. REYNOLDS TOBACCO COMPANY AND L. R. DONNELLY

Know All Men By These Presents:

That we, R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, as Principals, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound unto George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, the above named plaintiffs and appellees in the above entitled cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, for which sum well and truly to be paid we bind ourselves and our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of January, 1944.

Whereas, on the 23rd day of October, 1943, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that Court wherein George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, were plaintiffs, and R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon [50] D.

Hair were defendants, a judgment was rendered against said defendants in the sum of \$7,500.00, with interest and costs, and said defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, having filed in the office of the Clerk of said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

Now, Therefore, the condition of this obligation is such, that if the said R. J. Reynolds Tobacco Company and L. R. Donnelly, the appellants, shall prosecute said appeal and pay all costs that may be rendered against them or either of them if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award against these defendants or either of them if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

R. J. REYNOLDS TOBACCO
COMPANY,

By E. B. SMITH,

One of its attorneys of record,
Residing at Boise, Idaho,

L. R. DONNELLY,

By E. B. SMITH,

One of his attorneys of record,
Residing at Boise, Idaho,

Principal. [51]

UNITED STATES FIDELITY
AND GUARANTY COMPANY

By HENRY WHITSON,
Its attorney in fact,
Surety.

[Seal] HENRY WHITSON,
Resident Agent,
Residing at Boise, Idaho.

[Endorsed]: Filed Jan. 20, 1944. [52]

MANDATE

Filed Dec. 11, 1944

United States of America—ss:

The President of the United States of America

To the Honorable the Judges of the District Court
of the United States for the District of Idaho,
Eastern Division—Greeting:

Whereas, lately in the District Court of the United States for the District of Idaho, Eastern Division, before you, or some of you, in a cause between George H. Newby, in his own behalf; Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, plaintiffs, and R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, defendants No. 1196, a judgment was duly filed on the 23rd day of October, 1943, which said judgment is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and [53] as by the

inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by R. J. Reynolds Tobacco Company and L. R. Donnelly, as appellants against George H. Newby, in his own behalf, Richard Arlen Newby, and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, as appellees, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 18th day of September in the year of our Lord One Thousand, Nine Hundred and Forty-four the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly submitted; [54]

On Consideration Whereof it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellants, and against the appellees, and that this cause be, and hereby is remanded to the said District Court with directions to grant a new trial.

It is further ordered and adjudged by this Court that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

(November 6, 1944).

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause in accordance with the opinion and

judgment of this court, and as according to right and justice and the laws of the United States ought to be had, the said judgment of the said District Court notwithstanding.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, the 8th day of December, in the year of our Lord One Thousand Nine Hundred and Forty-four.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Amount of Costs Allowed and Taxed

In Favor of appellants and Against appellees, as
per Annexed Bill of Items, Taxed in Detail: \$740.12.

PAUL P. O'BRIEN

Clerk. [55]

[Title of Court and Cause]

MOTION

Comes Now, the defendants, R. J. Reynolds Tobacco Company, and L. R. Donnelly, and move the Court for an order staying all further proceedings in this cause until the costs taxed, in the amount of \$740.12, against the plaintiffs on appeal herein, in the Circuit Court of Appeals of the 9th Circuit, reversing the lower court, and taxing the plaintiffs with the costs of such appeal, are paid;

This motion is based upon the records and files

in this action and the affidavit of A. L. Merrill, filed herewith and made a part hereof.

R. J. REYNOLDS TOBACCO
COMPANY and

L. R. DONNELLY

By E. B. SMITH

Residing at Boise, Idaho

By A. L. MERRILL and

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for Defendants.

(Service Acknowledged.) [56]

[Title of Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION

State of Idaho

County of Bannock—ss.

A. L. Merrill, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendants in the above-entitled action; that the Circuit Court of Appeals for the 9th Circuit directed judgment to be entered against plaintiffs in said cause in the sum of \$740.12, as costs of said appeal; that said costs have not been paid nor has any part thereof, although demand has been made therefor upon plaintiffs; that plaintiffs do not have on file any cost bond nor other security whatever.

A. L. MERRILL

Subscribed and sworn to before me this 17th day of February, 1945.

[Seal] O. R. BAUM

Residing at Pocatello, Idaho

(Service Acknowledged.) [57]

[Endorsed]: Filed February 22, 1945.

[Title of Court and Cause]

AFFIDAVIT IN OPPOSITION TO DEFEND-
ANTS' MOTION FOR STAY OF PRO-
CEEDINGS.

State of Idaho

County of Bannock—ss.

B. W. Davis being first duly sworn upon his oath, deposes and says:

That he is the attorney for the plaintiffs in the above entitled cause; that he personally made a sworn statement which was presented to the Officer in Charge, Ship Repair Unit, Navy 128, c/o F. P. O., San Francisco California, in which statement he set out the status of the present cause and the necessity of Mr. Newby attending the trial of said cause; that said statement was made on the 8th day of January, 1945; that the matter was referred to W. H. Egan, Commander in the United States Naval Reserve, United States Navy Repair Unit, Navy 128 c/o F.P.O., San Francisco, California; that affiant was notified by Commander Egan that it would be necessary to secure a setting of the case and assurance that the matter would be disposed

of at the time set before Mr. Newby's application for emergency leave could be or would be passed upon; that thereafter, on the 23rd day of January, 1945, affiant requested of the Federal District Judge in the above entitled cause that said case be set; that on the 26th day of January, 1945, he received a letter from Honorable Chase A. Clark, Federal District Judge, advising that the case had been set for trial for the 19th day of March, 1945, a copy of said letter being mailed to Merrill and Merrill, and Mr. A. B. Smith, Attorneys for Reynolds Tobacco Company and L. R. Donnelly; that immediately thereafter and between [58] the 27th day of January, 1945 and the 5th day of February, 1945, the exact date not being known to affiant, affiant spoke to Mr. A. L. Merrill personally, advising him that the case had been set and that he was expecting Mr. Newby to secure a leave and return; that in addition thereto, on the 5th day of February, 1945, affiant wrote and mailed the following letter:

February 5, 1945

Merrill & Merrill, Attorneys,
City.

Attention: Mr. A. L. Merrill:

Re: Newby v. Hair et al.

Dear A. L.

I believe Judge Clark sent you copy of his letter to me of the 26th ult. I requested him to give us as nearly as possible the date of the setting of this case because it was necessary to make a proper

showing to Mr. Newby's commanding officer in order to secure a leave that he might attend the trial of this case.

We are planning on trying it on March 19th and I have been advised by Mr. Newby's commanding officer that he would be granted sufficient leave at that time to attend the trial.

Yours very truly,
B. W. DAVIS.

D/g

That immediately upon receipt of the notice from the Federal Court that said cause would be tried on the 19th day of March, 1945, affiant wired W. H. Egan, Commander, to that effect and immediately thereafter received the following letter:

D. S. Ship Repair Unit /js/ 5
Navy Number 128
c/o Fleet Post Office,
San Francisco, California

2 February 1945

Mr. B. W. Davis,
Attorney at Law,
Ross-Davis Bldg.,
Pocatello, Idaho

Dear Sir:

This will acknowledge your letter of 8 January 1945, regarding George Newby, MoMM2c, USNR. I am pleased to inform you that it is our intention

to allow Newby an emergency leave of thirty (30) days, commencing the latter part of February. He should therefore, be available for the trial, you mentioned in your letter, during the month of March.

I regret that it has been impossible for me to give you an answer to your question before this time, and if I can be of further assistance in this matter, please do not hesitate to write to me.

Sincerely yours,

W. H. EGAN

Commander, U. S. Naval Reserve

WHE/js [59]

That immediately thereafter and on the 7th day of February, 1945, he also wrote said W. H. Egan a letter as follows:

February 7, 1945

W. H. Egan, Commander,
U. S. Naval Reserve,
U. S. Ship Repair Unit,
Navy Number 128,
c/o Fleet Post Office,
San Francisco, Calif.

Re: George H. Newby MoMM2c USNR

Dear Mr. Egan:

Thank you kindly for your letter of the 2nd inst., with reference to Mr. Newby's emergency leave.

For your information, I am enclosing copy of

letter from our Federal District Judge. He has set this case for trial on the 19th of March. I can see no reason that would prevent the case being tried and completed the week beginning March 19th.

Yours very truly,
B. W. DAVIS.

D/g Enc.

That this affiant has prepared for the trial of said cause; has caused the witnesses that are to be called on behalf of the plaintiffs to be subpoenaed, and that he can truthfully state that Mr. Newby would not have been given an emergency leave unless the Commandant above referred to had been assured that said cause would be tried;

That no opposition on behalf of counsel for the defendant was received in this cause and no motion made until the 17th day of February, 1945.

Dated this 13th day of February, 1945.

B. W. DAVIS

Subscribed and Sworn to before me this 13th day of March, 1945.

[Seal]

LAURA S. GOUGH

Notary Public

Residing at Pocatello, Idaho.

[Endorsed]: Filed March 13, 1945 [60]

[Title of Court and Cause.]

AFFIDAVIT BY POOR PERSON TO DIS-
PENSE WITH SECURITY FOR COSTS
AND IN OPPOSITION TO THE MOTION
OF DEFENDANTS FOR STAY OF PRO-
CEEDINGS UNTIL COSTS ON APPEAL
ARE PAID.

State of Idaho

County of Bannock—ss.

George H. Newby, being first duly sworn upon his oath, deposes and says:

That he is a citizen of the United States of America; that he is one of the plaintiffs in the above entitled action, appearing on his own behalf and as Guardian Ad Litem for his two minor children; that he is entitled to commence and maintain said action in said court;

He further states the fact to be that because of his poverty, he is unable to pay the costs of said action or to give security for the same; that he and his children are the only ones holding a beneficial interest in the outcome of said action and that the nature of his cause of action is clearly and concisely set out in his complaint filed in said cause;

He further states that he is thirty-seven years of age and that he is a M.O.M.M. First Class in the United States Navy; that he has been a member of the forces of the United States Navy since on or about the 31st of December, 1943; that he does not have any funds or moneys on hand with which to pay any or all of the costs assessed against him

in the above entitled cause; that his children are both under the age of eleven years, do not have any funds of their own, and are entirely dependent upon this affiant for their support and keep; that affiant has in his possession the sum of [61] approximately One Hundred Dollars; that it is all the money or property that he has; that said amount of money is not any more than sufficient to pay his expenses of bringing his two children and his mother-in-law to Pocatello for the trial of this cause, where he must board and room them; where he must pay his own keep and when the trial is completed, he must pay his own expenses and fare to the Pacific Coast for his point of embarkation;

That prior to his entry in the United States Navy, he was a workman for the M-K Construction Company; that he does not have any friends or relatives who can or will either loan him the money to pay the costs or to go his security; that he is willing and consents that in the event of his success in the retrial of the present cause that he will allow upon any judgment or verdict rendered, a credit to the defendant for the costs taxed on appeal;

That this affiant and his counsel were required to make special application through the Fourteenth Naval District for his release from his duties for a sufficient length of time to attend the trial of the case; that they were required to advise and to show to the Commandant passing upon the matter, that it was an emergency; that the case had been set for trial, and that the matter would be defi-

nately concluded; that if this affiant had known or been advised at the time he secured his emergency leave that said cause could or would not be tried, or that he was obliged to pay the amounts of costs taxes on appeal, he could not and would not have secured leave for the reason that he had no money with which to pay said costs upon appeal;

That this affiant does not have any credit with any bank or commercial institution that will loan him money; that he does not have any security to give for a loan or for a bond; that from the first day of August, 1944 to the First Day of February, 1945, affiant received the sum of \$98.00 per month; that since the 1st day of February, 1945 his pay is \$113.00 per month; that out of his monthly pay, there is deducted the sum of \$28.50 for his children, approximately \$2.00 per month for insurance premiums, he is required [62] to buy all of his clothing and supplies of every kind; that he does not have net to him, after payment of his expenses, his share of allotment and the different items he is required to pay, in excess of \$40.00 to \$50.00 per month; that affiant has in his possession his complete Naval History and record, which he will upon request by the court, produce for inspection and examination by the court and opposing counsel;

That this affiant is willing to submit to oral and cross examination either by the court or by opposing counsel as to the truth of this affidavit;

That if this affiant is required to return to service without being able to present his case to the court and jury at this time, he will not be able to secure

another leave and must wait to retry the matter until the end of the present war; that affiant was advised by his commanding officer that the department was fearful that they would give him leave, that the case would be continued or that something would happen to prevent its trial.

Affiant further states that this affidavit is made and filed for the purpose of availing himself of the rights and privileges in such case provided by the Act of Congress, Ch. 209, Approved July 20, 1892, as Amended by Act of June 25, 1910, ch. 435, 36 Stat. L. 866;

That prior to affiant's entry in the service of the United States Navy, he was earning and receiving \$70.00 per week and that because of his service in the United States Navy, he is prevented from paying the costs assessed against him and he believes he is entitled to a stay of the collection of said costs and to relief therefrom under the Soldiers and Sailors Civil Relief Act of the United States; that he furthermore states that he is willing to submit himself to examination by the Court or to cross examination by the defendants on this matter.

GEORGE H. NEWBY

Subscribed and sworn to before me this 13th day of March, 1945.

[Seal]

LAURA S. GOUGH

Notary Public

Pocatello, Idaho.

[Endorsed]: Filed March 13, 1945. [63]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 12, 1945

This cause came on for hearing on Motion to Stay further proceedings. After oral argument by counsel for the respective parties, the Court, being fully advised in the premises, took the matter under advisement. [64]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 13, 1945

Comes now defendants' attorney, A. L. Merrill, Esquire, and moves that all further proceedings be stayed until costs taxed on appeal have been paid. The Court being fully advised, plaintiffs' attorney, B. W. Davis, Esquire, was given until 3 o'clock, P. M., to make showing as to why costs, or any part, could not be paid. B. W. Davis, Esquire, filed Affidavit in opposition to defendants' Motion for staying proceedings, also affidavits by poor persons to dispense with security for costs and in opposition to Motion.

The Court took the matter under advisement.

[Title of Court and Cause.]

MINUTES OF THE COURT

March 14, 1945

The Court, being fully advised in the premises, denied the Motion to stay further proceedings until costs in the trial be paid, with the understanding that, if any recovery was made by plaintiff, the amount of costs in former trial would be deducted from the Judgment. [65]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 19, 1945

This cause came on for trial before the Court and a jury; Messrs. B. W. Davis and Glen A. Coughlan appearing as counsel for the plaintiffs and Messrs. A. L. Merrill and E. B. Smith, appearing as counsel for the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.

The Clerk, under the directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper to secure a jury.

Ethel Young, whose name was drawn, was excused for cause; Mrs. Roy Lewis, whose name was so drawn, was excused on plaintiffs' peremptory challenge; Virginia Russell and Mrs. Stacy Bond,

whose names were likewise drawn, were excused on defendants' peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to wit:

E. A. Lindquist, Lee Corbridge, Mrs. George Mosier, Hans C. Christiansen, Maynard Bowersox, DeLoy Brown, Earl Wolfley, J. O. Ashcraft, A. V. Edwards, Ed Owens, Thomas J. Burns, Genevieve Lindsay.

The Court directed that one juror, in addition to the panel, be called to sit as an alternate juror. Thereupon, the name of Mrs. A. H. Bush, was drawn from the jury box, and on being sworn and examined on voir dire, was found duly qualified, and was accepted by counsel for the respective parties.

The jury panel and the alternate juror were sworn to well and truly try said cause, and a true verdict render.

After admonishing the jury and the alternate juror, the Court excused them until 2:00 o'clock, P. M., in order that counsel for the respective parties might argue a point of law. [66]

Trial of the case was resumed at 2:00 o'clock P. M., and after statement of plaintiffs' cause by their counsel, B. W. Davis, Esquire, E. B. Smith, Esquire, made a statement to the jury, in behalf of the defendants.

Whereupon Dr. R. B. Lindsay and Alton Bun-

derson were sworn and examined as witnesses on the part of the plaintiff, and Exhibit No. 6 was admitted for the purpose of the witness explaining to the jury, for illustrative purpose only.

After admonishing the jury and the alternate juror, the Court excused them to 10 o'clock, A. M., on Tuesday, March 20, 1945. [67]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 20, 1945

Trial of this case was resumed before the Court and Jury. Counsel for the respective parties being present, it was agreed that the jury and alternate juror were all present.

Motion was made by A. L. Merrill to strike Exhibit 9 (plaintiffs'); which Motion was overruled.

The testimony given by Calvin Teuscher from the transcript of the previous trial was read by B. W. Davis, Esquire.

L. R. Donnelly was called for cross examination, and was sworn and cross examined.

Rulon D. Hair was sworn and examined as a witness on the part of the plaintiffs.

B. W. Davis, Esquire, read the deposition of E. A. Darr in evidence.

The Jury was excused for counsel to argue a point of law under the rules.

B. W. Davis, Esquire, continued to read the deposition of E. A. Darr.

Cross-Examination was read by E. B. Smith, Esquire, from the deposition of E. A. Darr.

L. R. Donnelly was recalled on cross-examination for further questioning.

After admonishing the jury, the Court excused them to 10 o'clock, A. M., on Wednesday, March 21, 1945, and continued the trial to that time. [68]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 21, 1945

Trial of this cause was resumed before the Court and Jury. Counsel for the respective parties being present, it was agreed that the jury and alternate juror were all present.

L. R. Donnelly was recalled and questioned further on cross-examination.

R. N. Pugmire was sworn and examined as a witness on the part of the plaintiff.

The jury was excused for counsel to argue a point of law, until 1:30 o'clock, P. M., at which time trial of the case was resumed.

Motion by B. W. Davis, Esquire, to amend the Complaint by inserting the word "drunken" in paragraph VII, line 7 on page 2; objection by A. L. Merrill, Esquire, Motion granted.

Sid Close was sworn and examined as a witness

on the part of the plaintiff. Motion to strike testimony granted.

L. R. Donnelly was recalled on cross-examination.

Ben Buskirk was sworn and examined as a witness on the part of the plaintiff. Motion to strike testimony denied.

Fred H. Smullen was sworn and examined as a witness on the part of the plaintiff, and here the plaintiff rests.

F. M. Williams was sworn and examined as a witness in behalf of the plaintiff. Testimony taken in absence of the jury, to be read to the jury on rebuttal, by oral stipulation of counsel for the respective parties.

Carl Oxenbine, Jack Perkins, and Charles Nichols were sworn and examined as witnesses on the part of the defendants.

After admonishing the jury, the Court excused them to 10:00 o'clock, A. M., on Wednesday, March 22, 1945. [69]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 22, 1945

Trial of this cause was resumed before the Court and Jury. All counsel for the respective parties being present, it was agreed that the jury and alternate juror were all present.

Rulon D. Hair, C. A. Rasmussen were sworn and

examined as witnesses on the part of the defendants; Deposition of Darwin Perkins was read in evidence by E. B. Smith, Esquire; and L. R. Donnelly was sworn and examined as witness on the part of the defendants, and here the defendants rest.

On rebuttal, George H. Newby was recalled and further examined, and the testimony of F. M. Williams was read by the Court Reporter. And here both sides close.

Whereupon, the Jury was excused to 10:00 o'clock, A. M., on Friday, March 23, 1945, after having been admonished by the Court.

A. L. Merrill, Esquire, moved the Court for a directed verdict in favor of the defendant, for the reason that Rulon D. Hair was not acting within the scope of his work. Motion denied.

Comes now the plaintiff and moves the Court to instruct the jury to return a verdict as prayed for in the prayer of the complaint. Motion denied.

Whereupon, the Court continued the trial of the case until 10:00 o'clock, A. M., on Friday, March 23, 1945. [70]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 23, 1945

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury. The Court discharged the

alternate juror, and the jury panel retired in charge of Bailiffs, duly sworn, to consider of their verdict.

On the same day, the jury returned into Court, counsel for respective parties being present, whereupon, the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

VERDICT

“We, the jury in the above entitled cause find for the plaintiff and against the defendant R. J. Reynolds Tobacco Company, and assess plaintiffs’ damages in the sum of \$30,000.00.

J. O. ASHCRAFT

Foreman”

The verdict was recorded in the presence of the jury, and then read to them, and they each confirmed the same.

Thereupon, E. B. Smith, Esquire, counsel for defendant, took exception to the verdict of the jury.

[Title of Court and Cause.]

MINUTES OF THE COURT

March 24, 1945

The Court ordered the Clerk to enter Judgment in the full amount as set forth in the Jury’s Verdict. [71]

[Title of Court and Cause.]

VERDICT

We, the Jury in the above entitled cause find for the plaintiff and against the defendant R. J. Reynolds Tobacco Company, and assess plaintiffs' damages in the sum of \$30,000.00.

J. O. ASHCROFT

Foreman.

[Endorsed]: Filed March 23, 1945. [72]

In the District Court of the United States, in and for the District of Idaho, Eastern Division

No. 1196

GEORGE H. NEWBY, in his own behalf, RICHARD ARLEN NEWBY, and PATTY ANN NEWBY, both minors, by their guardian ad litem, George H. Newby,

Plaintiffs,

vs.

R. J. REYNOLDS, TOBACCO COMPANY and L. R. DONNELLY,

Defendants.

JUDGMENT

This action came regularly on for trial, the parties appearing by their attorneys. A jury of twelve persons was regularly empaneled and sworn to try said action, and oral and documentary evi-

dence was introduced on the part of the plaintiffs and defendants. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and presented their written verdict, as follows:

[Title of Court and Cause.]

VERDICT

“We, the Jury in the above entitled cause find for the plaintiff and against the defendant R. J. Reynolds Tobacco Company, and assess plaintiffs’ damages in the sum of \$30,000.00.

J. O. ASHCROFT,

Foreman.”

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that plaintiffs do have and recover from the defendant, R. J. Reynolds Tobacco Company, the sum of Thirty Thousand Dollars (\$30,000.00), with interest thereon from the date hereof until paid, together with plaintiffs’ costs and disbursements incurred in this action taxed at the sum of \$278.09.

Witness the Honorable Chase A. Clark, Judge of said court and the seal thereof this 24th day of March, 1945.

[Seal]

ED. H. BRYAN

Clerk. [73]

[Endorsed]: Filed March 24, 1945.

[Title of Court and Cause.]

PETITION ON MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT AND, IN
THE ALTERNATIVE FOR A NEW TRIAL,
AND MOTION FOR NEW TRIAL

Comes Now, R. J. Reynolds Tobacco Company, one of the above named defendants, and moves the court to set aside the verdict of the jury and the judgment entered thereon, which judgment was made and entered March 24, 1945, and to enter judgment in defendants favor notwithstanding the verdict in accordance with the motion made by said defendant for a directed verdict at the conclusion of all of the evidence, which motion is hereafter summarized and is upon the following grounds, to-wit:

(1) That the evidence is wholly insufficient to support a verdict and judgment in favor of the plaintiffs, and against the defendant, more particularly in that the evidence shows without substantial conflict that at the time the accident occurred, and for approximately eighteen hours theretofore the said Rulon D. Hair, was not acting as the Agent of said defendant, and was not within the scope of his employment, nor doing anything within his scope to further the business of his master, and was entirely upon a pleasure party of his own, and at the time of the accident referred in this cause, he was transporting Avanell Newby, now deceased, with him as his guest to her home in Montpelier, Idaho. [74]

(2) That the evidence conclusively shows that

Avenell Newby was riding in the automobile as a guest of Rulon D. Hair, which automobile was owned by R. J. Reynolds Tobacco Company, and the said Rulon D. Hair had no authority of any kind or character from either the said R. J. Reynolds Tobacco Company, or its agent, L. R. Donnelly to haul guests in said car, but had positive oral and written instructions that under no circumstances was he permitted to haul guests in said car, and that no one should be transported by him in such car, other than an employee or officer of the Company, and that this automobile was used at the time of the accident in violation of these instructions, and the evidence is wholly and completely insufficient in law to show a waiver of these instructions on the part of either R. J. Reynolds Tobacco Company, or its agent L. R. Donnelly.

(3) That the evidence wholly and completely fails to show that the said Rulon D. Hair was a careless, negligent, drunken and incompetent driver, or that he was habitually negligent, and that the one incident which occurred in Pocatello, in 1939, (referred to as the Myers' incident) is wholly and completely insufficient as a matter of law to establish the status of incompetency on the part of the driver.

(4) That the evidence wholly and completely fails to support the charge of plaintiffs, contained in paragraph numbered VII of their amended complaint, in effect that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, permitted the said Rulon D. Hair, to use the truck of the

defendants, knowing him to be a careless, reckless, drunken and incompetent driver of an automobile, and whereby plaintiffs thereby attempted to charge negligence on the part of the defendant in such manner for the reason that the evidence wholly and completely fails to show that Hair had a status of being careless, reckless, drunken or incompetent in the use of an automobile, nor is there any evidence that any such claimed status ever came to the knowledge [75] of the defendant, R. J. Reynolds Tobacco Company, or its agent, L. R. Donnelly.

(5) That the evidence introduced and admitted for the alleged purpose of showing Rulon D. Hair to be a careless, reckless, drunken and incompetent driver of an automobile, was wholly and completely insufficient as a matter of law to establish the status of incompetency, or carelessness, or drunkenness, or recklessness on the part of Rulon D. Hair, at the time of said accident, nor that such had anything to do therewith.

(6) That the evidence fails to show that at the time of said accident Rulon D. Hair was in anywise guilty in violating the guest statute of the State of Idaho, or that he was guilty of reckless, disregard of the rights of Avenell Newby, or of any violation of any other of the requirements stated in said statute providing for recovery of the guest suffering damage, and shows that he was not guilty of any such negligence required by the guest statute at the time of said accident.

Said defendants refer to the motion for a di-

rected verdict as made in open court and as the same appears in the notes of the reporter for further particulars.

In the event of a refusal of the court to grant said motion for judgment notwithstanding the verdict, then said defendant moves in the alternative for an order setting aside verdict and judgment rendered herein, and the granting of a new trial, pursuant to rule 50 of the Rules of Federal Procedure, and also moves the court for an order granting a new trial pursuant to rule 59 of the Rules of Federal Procedure, upon the following grounds:

I.

Insufficiency of the evidence to justify the verdict, and that it is against the law in this, to-wit:

(1) The evidence fails to show that at the time of the accident in which Avenell Newby was injured, while riding as a guest in an automobile driven by Rulon D. Hair, that said Rulon D. Hair was acting as an agent, servant or employee of R. J. Reynolds Tobacco Company, or L. R. Donnelly, but on the contrary, the evidence conclusively proves that at said time, and for approximately eighteen hours theretofore the said Rulon D. Hair was not acting as such agent, servant or employee within the scope of any employment of said defendants, or either of them, but on the contrary was engaged entirely with the said Avenell Newby on a pleasure party involving only the interests of the said Rulon D. Hair and Avenell

Newby. That the presumption, if any, of the status of a driver of an automobile owned by another, or the condition and character of said car, and the time and place of its use, as to the driver's agency, in this case is completely and wholly destroyed and overcome by the positive, undisputed testimony introduced in said cause showing clearly that the said Rulon D. Hair was not acting for his employer at the time of said accident, but was wholly and completely in the furtherance of a purpose of his own.

(2) It is undisputed that Avenell Newby was riding in said automobile at the time of said accident as a gratuitous guest of Rulon D. Hair, who was not then acting within the scope of his employment and was being transported by him as such guest, contrary to positive written and oral instructions forbidding the hauling of guests or any person other than an employee of the defendant corporation. The evidence is completely and wholly insufficient, as a matter of law, to prove a waiver of said instruction to the said Rulon D. Hair, on the part of the said R. J. Reynolds Tobacco Company, or L. R. Donnelly.

(3) That the evidence introduced by the plaintiffs, [77] over the objection of the defendants, for the purpose of attempting to prove Rulon D. Hair was an incompetent, careless, drunken and reckless driver of an automobile, is wholly and completely insufficient to establish his status as such, and save for the Myers incident, referred to in the testimony, there is no evidence showing, or tend-

ing to show that the said R. J. Reynolds Tobacco Company or L. R. Donnelly had any knowledge, or information of any kind or character that the said Rulon D. Hair ever had been involved in an accident, but that the evidence, on the contrary, shows that he had a record of a high degree of competency, and care in the use of the defendant's automobile, and that the evidence thus introduced is wholly insufficient as a matter of law to establish in Rulon D. Hair a status of incompetency, or recklessness, or drunkenness, or carelessness.

(4) That the evidence introduced over the objection of the defendant, of the witnesses Pugmire, Close, Buskirk and Smullen was wholly and completely insufficient as a matter of law to establish any of the allegations of paragraph numbered VII of plaintiffs' amended complaint, wherein it is charged that defendant was negligent in hiring Rulon D. Hair, knowing him to be a careless, reckless, drunken and incompetent driver of an automobile, and that such evidence is wholly insufficient to prove such status, or that he had a reputation for such, and wholly failed to prove that any such reputation for such asserted acts or conduct, on the part of Hair, if any in fact exists, was known, or by the use of reasonable diligence could have been known to defendant R. J. Reynolds Tobacco Company, or its agent L. R. Donnelly.

(5) It is alleged, and the evidence establishes the fact that Avenell Newby at the time of the accident was riding in said automobile as a gratuitous guest of Rulon D. Hair. The evidence fails to show

that at the time of said accident the said [78] Rulon D. Hair, was guilty of violating the guest statute of the State of Idaho, or that he was guilty of reckless disregard of Avenell Newby. The evidence further shows that at the time of said accident the said Avenell Newby was riding in said automobile in company with the said Rulon D. Hair, at her request, and that she joined with the said Rulon D. Hair in any act or acts performed by him prior to said accident and during the trip in which they were jointly engaged, and that preceding said accident she was in a position to be as observant of surrounding conditions, and of such acts and omissions on the part of the said Rulon D. Hair, as was Rulon D. Hair; that she was conscious and could observe all of the acts of said Hair in the operation of said motor vehicle, but at no time made protest or objection to any act or acts regarding the operation of said automobile, but acquiesced in the conduct of Rulon D. Hair, whatever the same might have been in the operation of said automobile, and became as a matter of law, as much liable for any act or omission of the driver of said car as the driver himself could have been, and thereby became, and her heirs now are, estopped from asserting any dereliction of the said Rulon D. Hair, as a basis for a claim for damages.

That in each and all of the particulars hereinbefore before recited said evidence is insufficient in law to justify the verdict of the jury and the judgment rendered thereon, and that said verdict and

judgment, and each of them, is against the law governing and controlling such matters.

II.

Misconduct of the jury.

III.

Excessive damages appearing to have been given under the influence of passion or prejudice.

IV.

Errors in law occurring at the trial, more particularly, as follows. [79]

(1) Error of the court in denying the motion of R. J. Reynolds Tobacco Company, made at the conclusion of the plaintiffs' evidence, to require plaintiffs to elect upon which of the two theories recited in the amended complaint they would rely for judgment, that is to say, whether they would rely upon the theory that Hair at the time of the accident, was acting within the scope of his employment when driving Avenell Newby, as a guest; or, whether they would rely upon the theory that Hair was an incompetent, drunken, careless and negligent driver and known to be such to the defendant.

(2) The court erred in admitting in evidence, over the objection of the defendant, the testimony of R. M. Pugmire, Ben Buskirk and Sid Close, for the reason that in each instance said testimony was incompetent, irrelevant, immaterial and prejudicial to the defendants, more particularly in that the same did not prove or tend to prove any issue made by the pleadings.

(3) The court erred in denying defendant's motion to strike the testimony of R. M. Pugmire, Ben Buskirk and Sid Close, and the testimony of each of said parties, which motions were made after each witness had testified, upon the ground that such testimony was incompetent, irrelevant, immaterial and prejudicial to the rights of the defendant and did not prove any issue in said cause.

(4) The court erred in denying defendant's motion to withdraw from the consideration of the jury all matters relating to and evidence offered to support the allegations of paragraph Numbered VII of plaintiffs' amended complaint, upon the ground and for the reason that said issue was not properly in this cause, and that the evidence offered and admitted to prove the same was wholly insufficient for such purpose, and [80] permitting the same to be considered by the jury was prejudicial to this defendant. The evidence referred to herein, is the testimony of the witnesses Pugmire, Buskirk, Close and Smullin, and all testimony touching the alleged reputation of Rulon D. Hair, and particularly relating to the so called Myers incident.

(5) The court erred in admitting in evidence, over the objection of the defendant that the same was incompetent, irrelevant, immaterial and prejudicial to the defendant, plaintiffs' exhibit number 24, the same being a certified copy of an information, and the verdict of the jury in the case wherein Rulon D. Hair was charged and convicted of manslaughter in the Myers incident, for the reason

stated in the objection when said exhibit was offered.

(6) The court erred in admitting in evidence, over defendant's objection, that the same was incompetent, irrelevant, immaterial and prejudicial, plaintiffs' exhibit 9, the same being a photograph of Avenell Newby taken approximately two years before her death, for the reason stated in defendant's objection to the introduction of said exhibit.

(7) The court erred in permitting the plaintiffs to introduce in evidence on their direct case, over the objection of the defendant that the same was irrelevant, immaterial, incompetent and prejudicial to its interests, the testimony on cross examination of the witness, E. A. Darr, particularly insofar as the same dealt with instructions to Rulon D. Hair, concerning the hauling of guests, and all matters touching the so called Myers incident of 1939.

(8) The court erred in denying defendant's motion for a directed verdict in its favor, for the reasons hereinbefore recited. [81]

(9) The court erred in permitting the plaintiff, during the trial, over the objection of the defendants, that the same was immaterial to the issue, and prejudicial to the defendant, to amend their amended complaint by adding the word "drunken" in paragraph VII thereof.

(10) The court erred in giving to the jury that certain instruction, reading as follows:

"You are instructed, that if you believe that Rulon D. Hair, who has been mentioned many times during the trial of this case as the driver of the

truck was a careless, reckless, drunken, incompetent driver, and that the defendants R. J. Reynolds Tobacco Company, and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckless and incompetent driver, or that he was acting as the agent, servant, or employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.”

for the reason that said instructions deal with an issue not properly before the jury, and upon which no competent or sufficient evidence justified the submission of the matter contained in said instruction to the jury.

(11) The court erred in giving to the jury all of instructions numbered 9 and 15, upon the same ground and for the same reason set forth as objections to the last above quoted instruction.

(12) The court erred in giving to the jury that certain instruction, reading as follows:

“You are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile.”

upon the ground and for the reason that the same is too limited in its wording and does not contain the necessary limitations with respect to the facts and circumstances under which said automobile was

used and the evidence adduced with respect thereto.

(13) The court erred in giving to the jury that certain instruction, reading as follows:

“The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the state statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided that it shall be prima facie lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall be prima facie unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities,”

upon the ground and for the reason that said instruction is based upon a statute covering ordinary negligence in which automobiles may be involved and does not have application in the instant case, or to any case where the guest statute is involved,

and that said instruction tends to mislead and confuse the jury into considering a case in which this law is involved rather than involving the guest statute.

(14) The court erred in giving to the jury that certain instruction, reading as follows:

“You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenell Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issue,”

upon the ground and for the reason that said instruction does not cover the pleadings and the facts in this case, particularly in that there is no allegation that the said Rulon D. Hair was intoxicated at the time of the accident, and intoxication [83] is not pleaded as a ground for recovery under the guest law, and as such could not be the proximate cause of the death of Avenell Newby, and is addressed to an issue which is not properly involved in this case, in that the question of the status of Rulon D. Hair as a driver is not properly before the court on an issue attempting to bind his employers.

(15) The court erred in giving to the jury that part of instruction number 26, reading as follows:

“The amount of damages, if any, which you allow shall in no event exceed the amount prayed for in the plaintiffs’ complaint,”

upon the ground and for the reason that the plaintiffs in this case should not be allowed to recover more than \$7500.00, the same being the amount heretofore awarded against Rulon D. Hair, as the agent, servant and employee of said defendant, and that the jury should have been so instructed with the instruction on damages.

(16) The court erred in refusing to give to the jury defendant’s requested instruction number 11, reading as follows:

“You are instructed, that in respect to the issue as to damages, if you come to consider that issue, the court charges you as a matter of law, that in no event in this case can you award damages against the defendants in excess of the sum of \$7500.00,”

for the reason that this case has heretofore been tried before a jury as against these defendants and Rulon D. Hair, the agent, servant and employee of said defendant, with a joint verdict having been rendered in the sum of \$7500.00, from which judgment the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly appealed to the Circuit Court of Appeals of the Ninth Circuit and Rulon D. Hair, did not appeal, and that the said Circuit Court of Appeals reversed the judgment as to

the defendant R. J. Reynolds Tobacco Company and L. R. Donnelly and remanded the matter for a new trial, and a new trial has been had against the last named defendants, and that the amount heretofore awarded [84] against the said Rulon D. Hair, servant, agent and employee of the R. J. Reynolds Tobacco Company and L. R. Donnelly became final and fixed the amount for which any judgment could be rendered against his employer, the R. J. Reynolds Tobacco Company.

(17) The court erred, after having refused to give defendant's instruction number 11, to the jury, in its refusal to give instruction number 12, reading as follows:

“You are instructed that this cause has heretofore been tried and a verdict rendered against all of said defendants in the sum of \$7500.00. R. J. Reynolds Tobacco Company and L. R. Donnelly appealed said cause to the Appellate court. Rulon D. Hair did not appear. Said judgment was reversed as to R. J. Reynolds Tobacco Company and L. R. Donnelly and the cause was remanded for a new trial as against them. The judgment against Rulon D. Hair was not appealed from either by him or by the plaintiffs. It therefore is final so far as Rulon D. Hair is concerned, and you are to decide this case upon the issues of whether or not R. J. Reynolds Tobacco Company and L. R. Donnelly are also responsible. In this respect, you are specifically charged that the judgment against the defendant, Hair, should not in any sense be taken by you as any evidence of any liability on the part of the Tobacco Company or L. R. Donnelly, but that you must de-

cide the case, so far as liability may be concerned, or the lack of it, as though no previous judgment had been rendered. In this respect, however, you are definitely charged that in the event you should find against these defendants and determine to assess damages, you can not render a verdict in excess of \$7500.00. This does not mean that the verdict, if you find against said defendants, should reach said sum, but that you are authorized, if you find the plaintiffs entitled to recover against the Tobacco Company and L. R. Donnelly, to fix the amount in such sum as you may find said plaintiffs have been damaged by the acts of the R. J. Reynolds Tobacco Company and L. R. Donnelly, not exceeding, however, the sum of \$7500.00,"

For the same reasons asserted as error for the failure to give the preceding instruction.

(18) The court erred in refusing to give to the jury defendant's requested instruction number 18, reading as follows:

"You are further instructed, that where a gratuitous guest, riding in an automobile being driven by another, fails to protest against the driver's proceeding at an excessive speed, such conduct constitutes contributory negligence as to preclude recovery for injuries and damages occasioned by such excessive speed."

upon the ground and for the reason that the law of the State of [85] Idaho is to the effect that a guest in an automobile is under the necessity of protesting the conduct of the host, and a failure to protest

against excessive speed, and conduct contributing to the accident, when such guest has an opportunity to do so, precludes recovery for injuries and damages by said guest.

(19) The court erred in refusing to give to the jury defendant's requested instruction number 20, reading as follows:

"The court instructs the jury that the answer of the defendants in this case alleges affirmatively that any injury caused Avenell Newby was due to her own acts of negligence. This is equivalent to an allegation that the contributory negligence of Avenell Newby had a casual connection with the injury. The burden of establishing contributory negligence by a preponderance of the evidence rests upon the defendants. This burden may be discharged but never shifted. You are instructed that the burden is upon the defendants under their charge of contributory negligence to prove not only that Avenell Newby was negligent but that her negligence contributed to and had a casual connection with her death. If, however, contributory negligence appears on the plaintiffs' side of the case and from the plaintiffs' witnesses, whether the same be by direct examination or under cross-examination, and from such testimony you find that there was contributory negligence in this case, then and in that event you are instructed that you should consider such defense even though no testimony was offered affirmatively by the defendants in the proof thereof. In this connection, you are further instructed that contributory negligence means: Negligence on the part of Avenell

Newby either by an act on her part or omissions when a reasonable person would have acted in an effort to prevent the injury, and which negligence helped to cause or bring about the injury complained of; and you are further instructed that if you believe the said Avenell Newby could have prevented the injury, and failed to do so, you should find for the defendants,”

for the reason that under the facts in this case the question of contributory negligence of Avenell Newby, is a defense pleaded and asserted herein, and is supported by the evidence, and that said matter ought to have been submitted to the jury for its consideration, as a defense of the defendant R. J. Reynolds Tobacco Company. [86]

(20) That the court erred in refusing to give to the jury defendant's requested instruction number 21, reading as follows:

“You are further instructed, that a gratuitous guest may not recover for his host's negligent operation of an automobile if conscious of apparent danger, or advised of such conditions and circumstances as would herald danger to a reasonably prudent person, he fails opportunely to protest, and acquiesces therein, and if you find from the evidence in this case that Avenell Newby knew, or as a reasonably prudent person should have known that Rulon D. Hair was operating and driving said automobile in a dangerous manner, and you further find that Avenell Newby after a seasonable opportunity so to do, failed to opportunely protest against such dan-

gerous driving and operation of said automobile, then, and in that event, the plaintiffs cannot recover,”

for the reason that the pleadings and evidence in this case is such as to render it necessary to advise the jury with reference to the conduct and duty of the guest in the car, and this requires such guest to seasonably protest to the conduct of the driver of the car, and under the law, if she failed so to do, she would assume all risks and can not recover.

(21) The court erred in refusing to give to the jury defendant's requested instruction number 22, reading as follows:

“You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor, and that the said Avenell Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under the influence of intoxicating liquor, then, and in that event, you are instructed that the said Avenell Newby assumed the risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances, the plaintiffs cannot recover in this case,”

for the reason that under the law of Idaho, if a guest participates and joins with a driver of an automobile in imbibing intoxicating liquor, the guest is equally liable, with the driver, and is contributorily

negligent, and assumes the risk of riding in such automobile with such host, and can not recover for any such injury. [87]

The reasons heretofore assigned as error on the part of the court in giving those certain instructions hereinbefore objected to, and the reasons assigned as error on the part of the court in refusing to give the foregoing requested instructions were in each instance, timely made at the trial of said cause.

(22) The court erred in entering judgment against the defendant, R. J. Reynolds Tobacco Company, when the jury found that the defendant L. R. Donnelly, was not liable by failing to find a verdict against him, particularly in that any liability, if any existed on the part of the Company, was by reason of knowledge or acts of Donnelly as Division Manager of said Company, and if he was not liable, then this defendant could not be liable.

(23) The court erred in entering judgment on the verdict against the defendant, R. J. Reynolds Tobacco Company.

The foregoing Motion and the whole of it, is based and will be made upon all of the records, files, pleadings and proceedings in the above entitled action, including the instructions given, and the instructions requested by the defendants and refused by the court, and upon the affidavit in support of motion for new trial by A. L. Merrill, filed herewith, directed particularly to excessive damages and misconduct of the jury, and upon the minutes of the court, as stated and defined in the Federal Rules of Civil Procedure, and as stated and defined in Rule 50 of

the practice of this court, and Reporter's transcript of testimony adduced in said cause.

E. B. SMITH,

Residing at Boise, Idaho.

A. L. MERRILL,

R. D. MERRILL,

Residing at Pocatello, Idaho.

(Service Admitted.)

[Endorsed]: Filed March 31, 1945. [88]

[Title of Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
NEW TRIAL

State of Idaho,

County of Bannock—ss.

A. L. Merrill, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendants, R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, in the above entitled court and cause; that he makes this affidavit in support of the motion for a new trial herewith made in the above cause by R. J. Reynolds Tobacco Company.

That the trial of said action commenced at 10:00 A.M. on Monday, the 19th day of March, 1945, and continued without interruption until the evening of March 23, 1945; that it was tried before a jury on said days, at the Court Room in the Federal Court House in Pocatello, Idaho; that said jury consisted

of two women and ten men, who lived at various points within the Eastern Division of the District of Idaho, and outside of the city of Pocatello.

That during the progress of said trial said case was highly publicized by headlines and articles which appeared in the Salt Lake Tribune, published at Salt Lake City, Utah, and having wide circulation in Pocatello and in said division, and in the Pocatello Tribune, published at Pocatello, Idaho, with a large circulation therein and in the surrounding counties; that said articles so published and circulated, as aforesaid, were calculated to, and affiant believes [89] did, affect the readers adversely to the position of the defendants, and particularly the members of the jury who may have read the same. As illustrative of the type and character of such publicity, affiant avers as follows:

That in the Salt Lake Tribune published Tuesday Morning, March 20, 1945, and circulated freely in Pocatello, Idaho, appeared an article with a headline in 24 point caps and lower case type, reading as follows:

“Machinist Flies From Saipan for \$100,000 Suit
Retrial”

In said article it is recited:

“Pocatello, Ida.—George H. Newby, motor machinist mate 1/C, Montpelier, flew home from his station on Saipan island to appear in federal district court Monday as co-plaintiff with his young son and daughter in re-trial of a \$100,000 damages suit involving the death of his wife in 1942.

Defendant is R. J. Reynolds Tobacco Co.

Plaintiff charged that his wife, Mrs. Avenell Newby, 28, died Sept. 16, 1942, from injuries sustained in an auto accident five days earlier on Highway 30, about 20 miles north of Montpelier. Mr. Newby contends she was a guest of Rulon D. Hair, Montpelier, company agent, in his fully loaded tobacco truck."

Later in the same article it is said:

"The Pacific veteran and his son and daughter, Richard Arlen Newby, 11, and Patty Ann Newby, 8, were awarded \$7500 a year ago in Idaho federal court. The tobacco company then appealed to the Ninth (San Francisco) court of appeals, and that court reversed the decision as it affected the company. They did not reverse the lower court's verdict against their agent, Mr. Hair."

On each day during the trial there appeared in said newspapers constantly reference to the "\$100,000 Damage Suit."

In the Pocatello Tribune of March 21, 1945, under a headline, "Damage Suit Before Court," it is recited:

"Retrial of the Newby vs. R. J. Reynolds Tobacco Company suit Monday brought the dramatic return of George H. Newby from his base on Saipan island where he is a motor machinist mate first class.

Newby, with his 11-year-old son Richard, and eight-year-old daughter Patty Ann, is suing the company for \$100,000 damages as the result of the death of the children's mother in 1942. Mrs. Newby

died Sept. 16, five days after she was injured in an accident while riding in a tobacco company truck with Rulon D. Hair of Montpelier." [90]

In this article further reference is made to the previous trial and the fact that a verdict of \$7500.00 had been awarded the plaintiffs, and the jurors' names were given.

In the Salt Lake Tribune of Thursday Morning, March 22, 1945, appears the following under an enlarged headline of 24 point caps and lower case type, as follows:

Retrial of \$100,000 Damage Suit Enters Third Day

Testimony Centers on Record of Driver, Previous Accident, Conviction; Firm Investigator Tells of Own Probe.

Pocatello, Ida.—A stormy retrial entered its third day Wednesday in federal district court between parties involved in a \$100,000 damage suit.

Plaintiffs were George H. Newby, motor machinist mate in the navy and Pacific war veteran, and his young son and daughter. They charge R. J. Reynolds Tobacco Co. and its division manager, L. R. Donnelly, Salt Lake City, with negligence in the auto accident death on Sept. 16, 1942, of Mr. Newby's wife, * * *

The said article then attempts to review the past history of Mr. Hair and recites that he "had been arrested for drunken driving and for the accidental death of Jacob Myers, Pocatello."

On March 22, 1945, the Pocatello Tribune contained an extended article under a headline in 24 point caps and lower case type, reading as follows:

“Case Argued in U. S. Court,” and then it is recited:

“Basis of George Newby’s \$100,000 suit against the R. J. Reynolds Tobacco company and its alleged agent, Rulon Hair, was revealed yesterday in federal court * * *.”

It is then recited that Hair had been previously arrested and convicted of manslaughter. In said article it is further recited:

“April 16, 1939, he (Hair) struck and killed Jacob Myers, while driving a company truck on East Center Street in Pocatello * * *.”

On Friday Morning, March 23, 1945, there appeared in the Salt Lake Tribune, a conspicuous article with a headline in 24 point caps and lower case type, reading as follows:

“Lawyers Rest in Retrial Damage Suit,” and it is then recited:

“Pocatello, Ida.—Both sides rested their case late Thursday [91] as defense attorneys completed presentation of evidence against the plaintiff in a \$100,000 damage suit retrial in federal district court.

Court attaches said the case will likely go to the jury by Friday afternoon. Involved are George H. Newby, 37, navy motor machinist mate, Montpelier, seeking to collect from the R. J. Reynolds Tobacco Co., for the auto accident death in 1942 of his wife,

Mrs. Avanell Newby, a guest passenger in a Reynolds Tobacco Co. truck."

That there appeared similar articles in each issue of said newspapers during said period of time and in every article it was stressed that this was a "\$100,000 Damage Suit," and the fact that George H. Newby, as plaintiff, was in the service of the country, and the inference in each article was that he was attempting to make recovery for himself and children.

That said newspapers were freely distributed in Pocatello during said week and were available at all news-stands and hotels; that affiant believes that same were read by the various members of the jury; that on Friday, the 23rd day of March, 1945, affiant saw a copy of a newspaper, which he believes was the Salt Lake Tribune, in the hands of one of the jurors during the forenoon and as she sat in the jury box.

After the appearance in the Salt Lake Tribune of the article dated March 20, 1945, affiant and co-counsel in said cause, interviewed the news-reporter for the Salt Lake Tribune and made a request that the proceedings of this cause be not further reported, and particularly that such language as above quoted or the substance thereof, be not used again, but that said request was of no avail.

Affiant further avers that at least five of said jurors who tried said cause had sons or close members of their families in the navy of the United States, and others had sons in the armed forces;

that during the entire time said case was tried the plaintiff, George H. Newby, was before the jury in navy uniform, and during the first four of said days said minor children aged 8 and 11, occupied conspicuous places before the jury.

That over the objection of the defendants there was permitted to be introduced in evidence, as plaintiff's Exhibit 9, a photograph of [92] Avaneil Newby taken approximately two years prior to her death, and which photograph, under the various circumstances in this cause, and particularly those hereinbefore recited, affiant believes had a perceptible affect upon the jury.

That said cause was hereinbefore tried before a jury in the same court, at a time when R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, were all defendants, and when the said George H. Newby was in civilian clothes, and the newspapers contained substantially nothing with reference to the trial, which verdict so rendered by said jury was for \$7500.00, upon evidence substantially the same; that in the second trial the said Rulon D. Hair was not a party and the jury did not have occasion to consider matters as against him, and said jury did not find a verdict against L. R. Donnelly, but returned a verdict in the sum of \$30,000.00 against the R. J. Reynolds Tobacco Company.

This affidavit is intended to be in support of those grounds of said Defendants Motion for a New Trial charging excessive damages, appearing to have been

given under the influence of passion and prejudice, and misconduct of the jury.

A. L. MERRILL.

Subscribed and Sworn to before me this 30th day of March, 1945.

[Seal] S. A. DUNN,

Notary Public, Residing at Pocatello, Idaho.

My commission expires: 3-1-47.

(Service Admitted.)

[Endorsed]: Filed March 31, 1945. [93]

[Title of Court and Cause.]

AFFIDAVIT IN OPPOSITION TO AFFIDAVIT OF A. L. MERRILL, FILED IN SUPPORT OF MOTION FOR A NEW TRIAL

State of Idaho,

County of Bannock—ss.

B. W. Davis, being first duly sworn, deposes and say:

That he is one of the attorneys for the plaintiffs in the above entitled cause and that he presented the evidence in said cause at the trial thereof to the jury without the assistance of any other counsel; that he has been a member of the bar of the State of Idaho, admitted to practice in all courts therein, for over thirty years and that he has been admitted to practice before the Federal District Court for Idaho for at least twenty-five years;

That he has carefully read the affidavit of A. I. Merrill, one of the counsel for the R. J. Reynolds Tobacco Co.; that with reference to Mr. Merrill's affidavit concerning the publicity given to the trial of the cause in daily newspapers, that the quoted portions of said publicity are no more prejudicial than plaintiff's complaint, and that it does not appear from the portions of newspaper articles quoted in the affidavit, that they could have prejudiced the jury or that they were read by the jury. That this affiant did not at any time during the trial see any newspapers in the possession of the jury except that on the afternoon of the final argument, the alternate juror, a Mrs. Moss from Idaho Falls, who was excused from jury duty after the [94] submission of the cause, did have a newspaper of some description in her hand;

That neither this affiant nor the plaintiff, at any time during the trial of said cause, made any suggestions to any newspaper reporter, nor discussed the case in any way with anyone connected with any newspaper as a reporter or otherwise; that no suggestion was ever made to this affiant by counsel for the Reynolds Tobacco Company or either of them, that they had any objection to articles being published in newspapers or that the jurors should not read the newspapers or that they desired that anything be done by counsel with respect thereto; that no suggestion was ever made by either of counsel for the defense to the court, that the jurors should be requested to not read the newspapers or that they were reading newspapers and the affidavit

of counsel in support of his motion for a new trial, does not state that any of the jurors at any time, read anything with reference to the trial of said cause in the newspapers; that if counsel for defendant spoke to any newspaper reporter and protested the publicity given the trial and the reporter ignored said request, counsel did not convey such information to this affiant or to the court at any time during the progress of the trial and this affiant believes that it was the duty of counsel to do so, if counsel for defendant thought the same was prejudicial; that it could hardly be expected that the jurors would ignore the daily newspapers when the news was very sensational insofar as the success of the United States Armed forces were concerned, at that particular time.

With reference to the affidavit of counsel for the defendant, that several of the members of the jury had sons or members of their families in the Navy or in the Armed Forces, the defendant only exercised one peremptory challenge to the members of the panel and did not request the allowance of any other or additional challenges; [95]

That George H. Newby did appear at the trial in the Navy Uniform; that his minor children were in the court room for three days of said trial, Monday, Tuesday and Wednesday, and Thursday forenoon, left the city and did not return; that this affiant did not at any time or in any way during the trial of said cause, do anything or attempt to do anything to play upon the sympathy or the prejudice of the jury because of the fact that plain-

tiff was in the service of his country; that not one single objection was made by counsel for the defense to either the opening or closing argument of this affiant to the jury; that not once during said trial, was there any animosity displayed between Counsel on either side toward the other counsel; that the case could not have been tried in a more gentlemanly or ethical manner in so far as counsel on both sides was concerned; that this affiant never once, during the trial or the argument, made any mention of the fact that Mr. Newby was in the service of his country;

That with reference to the next to the last paragraph of Counsel's affidavit concerning the rendition of a \$7,500.00 verdict in a former trial, the jury was instructed to entirely disregard any and all matters that they may have heard with reference to any former trial and such instruction was requested by the defendant.

This affidavit is made in opposition to the affidavit of Counsel for the defendant in support of its motion for a new trial herein.

B. W. DAVIS

Subscribed and Sworn to before me this 18th day of April, 1945.

[Seal]

LAURA S. GOUGH

Notary Public, Residing at
Pocatello, Idaho

(Service admitted.)

[Endorsed]: Filed April 20, 1945. [96]

[Title of Court and Cause.]

MINUTES OF THE COURT

June 6, 1945

This matter came on regularly to be heard on the Petition on Motion for Judgment notwithstanding the verdict, and in the alternative, for new trial, and motion for new trial; B. W. Davis, Esquire, of Pocatello, Idaho, appearing for the plaintiffs, and Messrs. Merrill & Merrill, of Pocatello, Idaho, and E. B. Smith, Esquire, of Boise, Idaho, appearing for the defendant, R. J. Reynolds Tobacco Company.

The Motion for Judgment notwithstanding the verdict, and in the alternative, for new trial, and motion for new trial, on behalf of the defendant, R. J. Reynolds Tobacco Company was argued by counsel for the respective parties, and by the Court taken under advisement.

[Title of Court and Cause.]

ORDER

Defendant Reynolds Tobacco Company having heretofore filed its motion for judgment notwithstanding verdict and, in the alternative for a new trial, and motion for new trial, and the Court thereafter having heard counsel for plaintiffs and defendants present the matter in open Court and having fully considered the said motions,

It Is Ordered that the motions be and the same are hereby denied.

Dated at Boise, Idaho, this 8th day of June, 1945.

CHASE A. CLARK,

United States District Judge

[Endorsed]: Filed June 8, 1945. [98]

[Title of Court and Cause.]

NOTICE OF APPEAL BY R. J. REYNOLDS
TOBACCO COMPANY

Notice is Hereby Given that R. J. Reynolds Tobacco Company, a corporation, one of the defendants above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment made and entered in the above entitled court and cause on the 24th day of March, 1945, which said judgment is in favor of the plaintiffs above named and against this appealing defendant, and from the order denying new trial made and entered June 8, 1945.

Dated this 13th day of June, 1945.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for defendant R. J.
Reynolds Tobacco Company

[Endorsed]: Filed June 13, 1945. [99]

[Title of Court and Cause.]

COST BOND ON APPEAL OF R. J. REYNOLDS TOBACCO COMPANY

Know All Men by These Presents:

That R. J. Reynolds Tobacco Company, a corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound unto George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, the above named plaintiffs, and appellees in the above entitled cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, for which sum well and truly to be paid we bind ourselves and our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of June, 1945.

Whereas, on the 24th day of March, 1945, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that Court wherein George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, were plaintiffs, and R. J. Reynolds Tobacco Company, and L. R. Donnelly were defendants, a judgment was rendered against the

defendant, R. J. Reynolds Tobacco Company, in the sum of \$30,000.00, with interest and costs, and [100] said defendant, R. J. Reynolds Tobacco Company, having filed in the office of the Clerk of said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

Now, Therefore, the condition of this obligation is such, that if the said R. J. Reynolds Tobacco Company, the appellant, shall prosecute said appeal and pay all costs that may be rendered against it if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award against said defendant if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

**R. J. REYNOLDS TOBACCO
COMPANY**

By **E. B. SMITH**

One of its attorneys of record
Residing at Boise, Idaho
Principal

**UNITED STATES FIDELITY
AND GUARANTY COMPANY**

By **HENRY WHITSON**

Its attorney in fact
Surety

[Seal]

HENRY WHITSON

Resident Agent Residing at
Boise, Idaho

[Endorsed]: Filed June 13, 1945. [101]

[Title of Court and Cause.]

ORDER APPROVING BOND AND GRANT-
ING STAY OF EXECUTION AGAINST R.
J. REYNOLDS TOBACCO COMPANY

The defendant, R. J. Reynolds Tobacco Company having this day filed its Notice of Appeal from the Judgment rendered in the above entitled cause in favor of the plaintiffs, George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, and against the defendant, R. J. Reynolds Tobacco Company, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed its petition for an order fixing the amount of the supersedeas bond and approving the proposed surety, and the form of said bond and granting a stay of proceedings;

Now, Therefore, It is hereby ordered that the amount of said Supersedeas Bond be fixed in the sum of Thirty Five Thousand (\$35,000.00) Dollars, and the bond tendered by the said R. J. Reynolds Tobacco Company in said sum with Maryland Casualty Company, a corporation, as surety, be and the same is hereby in all respects approved, and that all proceedings herein for the collection of said judgment against R. J. Reynolds Tobacco Company be and they are hereby stayed according to law.

Dated this 13th day of June, 1945.

CHASE A. CLARK,

District Judge

[Endorsed]: Filed June 13, 1945. [102]

In the District Court of the Fifth Judiciary District of the State of Idaho, in and for Bannock County

B-1591

STATE OF IDAHO,

Plaintiff,

vs.

RULON D. HAIR,

Defendant.

VERDICT

We, the Jury in the above entitled cause, find defendant guilty as charged in the information and we the Jurors recommend all leniency possible.

J. P. JENSEN,

Foreman

[Endorsed]: Filed Dec. 3, 1939. [109]

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock

Register No. B-1591

STATE OF IDAHO,

Plaintiff,

vs.

RULON D. HAIR,

Defendant.

CERTIFICATE

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District of the State of Idaho,

in and for Bannock County, hereby certify that the original files in the above entitled cause are on file in my office; that I have custody and control of the same and that the same are official records of the Fifth Judicial District of the State of Idaho, in and for Bannock County;

That the above and foregoing Prosecuting Attorney's information and verdict are true and correct copies of the originals on file in my office and that the verdict rendered is the verdict rendered upon the trial of the defendant, Rulon D. Hair, upon the charges set out in the Prosecuting Attorneys Information.

Dated this 16th day of March, 1945.

(Seal) (Sgd.) ANNA KEEFE

Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County.

[Title of Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed that, good cause existing therefor, the following exhibits may be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof and in lieu of having the same printed in the record, the remaining exhibits having been designated

in the contents of the record for printing which will also include defendants' Exhibits Nos. 18, 21 and 22, included in the deposition of E. A. Darr, excepting plaintiffs' Exhibit No. 23 which was not offered to the Clerk after rejection, and which exhibits thus stipulated to be transmitted are of such character as to be difficult to print and can best be considered by the appellate court in their original form, being numbered and described as follows:

No. 1—Business card of L. R. Donnelly.

No. 2—Photograph of car.

No. 3—Photograph of car.

No. 4—Photograph of car.

No. 5—Drawing or map.

No. 6—Drawing or map (admitted for illustrative purposes).

No. 7—Report of Bunderson (made by Hair to Bunderson). [113]

No. 8—Report of Bunderson.

No. 9—Photograph of deceased in frame.

No. 10—Motor registration receipt, 1939.

No. 11—Motor registration receipt, 1940.

No. 12—Motor registration receipt, 1941.

No. 13—Motor registration receipt, 1942.

No. 14—Report of L. R. Donnelly, dated September 15, 1942.

No. 15—Report of R. D. Hair.

No. 16—Corrected report of R. D. Hair.

No. 27—Card of National Safety Council, Inc., dated April 16, 1942, issued to R. D. Hair.

Dated this 27th day of June, 1945.

GLENN A. GOUGHLIN

B. W. DAVIS

Attorneys for plaintiffs and
appellees.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for defendants and
appellants.

[Endorsed]: Filed June 29, 1945. [114]

ORDER

It Appearing to the Court that the defendant, R. J. Reynolds Tobacco Company, by separate appeal, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and it further appearing that there are certain exhibits which would be difficult to print or to make copies thereof and can best be presented to the appellate court in their original form; and said parties having stipulated in the premises,

It Is Hereby Ordered that the foregoing stipulation is hereby approved, and pursuant thereto,

It Is Further Ordered, and this does order, that the exhibits described in said stipulation and hereby referred to for further particulars shall be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be by such Court held for inspection and used on appeal so taken by said appellants.

Dated: July 2nd, 1945.

CHASE A. CLARK,
District Judge

[Endorsed]: Filed July 2, 1945. [115]

[Title of Court and Cause.]

TRANSCRIPT

This matter was tried before the Honorable Chase A. Clark, United States District Judge, for the District of Idaho, sitting with a jury, at Pocatello, Idaho, on March 19, 1945.

Appearances:

Glen a Coughlan, Montpelier, Idaho; Ben W. Davis, Pocatello, Idaho, Attorneys for the Plaintiffs.

E. B. Smith, Boise, Idaho; Messrs. Merrill & Merrill, Pocatello, Idaho, Attorneys for the Defendants. [116]

March 19, 1945

10 O'Clock A.M.

The Court: This is the time set for the trial of the case of Newby v. Reynolds Tobacco Company, are you gentlemen ready?

Mr. Davis: The plaintiffs are ready.

Mr. Merrill: We are ready, but there arises the question as to who are the defendants in this case now. When it was tried before there were three defendants, The Tobacco Company and Mr. Donnelly and the Salesman, Mr. Hair, but now——

The Court: I take it now that there are only The Reynolds Tobacco Company and L. R. Donnelly, the case is in the condition that it would have been had Hair never been made a party.

Mr. Merrill: In this case there has been a trial and a judgment for \$7500.00 rendered against three

defendants; two of them appealed and the third did not appeal; as against the third defendant the judgment is final. Now this case comes here as against the employers of Mr. Hair and it is our position that the maximum of any damage that might be recovered is fixed by that prior judgment from which no appeal was taken either by Mr. Hair or the Plaintiffs and that, therefore, in this case, the trial is against the R. J. Reynolds Tobacco Company and L. R. Donnelly on all issues, and we insist that it is the duty of the Court to instruct the jury [122] that if they come to consider the question of damages they cannot find more than \$7500.00 which is the final judgment in this case heretofore rendered against the servant. We have abundant authorities on that.

The Court: It is my understanding that the rule is to the contrary,—did you have something to say Mr. Davis?

Mr. Davis: I wanted to ask counsel if he takes the position that \$7500.00 is all or as large a judgment as we could recover, but that we might recover a less amount and that would bind us.

Mr. Merrill: Yes.

Mr. Davis: Your position is that the maximum is \$7500.00, but that a lesser judgment might be returned?

Mr. Merrill: That's right.

(Further remarks of Counsel.)

The Court: One question I have in mind here: If under the law and rules they were not joint

tortfeasors, would it be just a question for the jury as to whether Mr. Hair was acting within the scope of his employment. If so, then the jury should bring in a verdict for \$7500.00. Is that the contention?

Mr. Merrill: I think there is only one question involved. Whether or not Hair, at the time of the accident was performing acts in favor or for his employer,— [123]

The Court: Pardon me, Mr. Merrill, let me ask, what position do you take, Mr. Black?

Mr. Black (Representing Mr. Hair): I take the position that the Judd case settled it.

The Court: You don't elect to have Mr. Hair brought into the case.

Mr. Black: No.

The Court: I would like to consider this matter and we will take a recess now until 2 o'clock, I would like to go over the authorities counsel mentioned.

(2 O'Clock P.M., March 19, 1945)

The Court: In view of the position of counsel for the defendants, that Hair is not a party to this suit because he did not appeal and has settled the matter as far as Hair is concerned, and in view of the fact that Mr. Hair is here with his attorney and has announced to the Court that they have no interest in this suit and that the matter has been finally settled so far as Hair is concerned and there is no desire on their part to take advantage of the reversal as against the plaintiff. As to Donnelly

and Reynolds Tobacco Company the case will proceed and the question of damages that is, as to the amount of recovery to which they are entitled, in case there is a recovery, in reference to the verdict which has been heretofore rendered against Hair; the Court will reserve ruling on that [124] until the matter is submitted to the jury; then the matter will be taken care of in instructions to the jury. In the meantime if counsel have any other authorities that they would like to present to the Court during the trial I would appreciate them. I would appreciate any authorities either side may have on this matter.

Mr. Davis: I ask that Mr. Hair be kept here as a witness.

The Court: Yes. I presume that he would be here during the trial, anyway.

(Whereupon the jury was selected. Statements were made to the jury by Counsel for the plaintiffs and Counsel for the defendants.)

R. B. LINDSEY,

being called as a witness on the part of the Plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name, please?

A. R. B. Lindsey.

Q. Where do you live, Doctor?

(Testimony of R. B. Lindsey.)

A. Montpelier, Idaho.

Q. How long have you lived there?

A. Since 1937.

Q. And have been practicing medicine there during that time have you, Doctor?

A. Yes, since 1937. [125]

Q. Are you a graduate of a recognized medical school? A. Yes, sir.

Q. What school are you a graduate from?

A. Northwestern University Medical School.

Q. And you are admitted to practice as a physician and surgeon in Idaho? A. Yes, sir.

Q. Did you know Avenell Newby during her lifetime? A. Yes, sir.

Q. How long had you known her?

A. Approximately six months, I guess.

Q. Had you had occasion to treat her during the year 1942? A. Yes, sir.

Q. I call your attention to the date of September 11, 1942, was that the occasion on which you treated her? A. Yes, sir.

Q. And what time of day was it, Doctor?

A. Approximately five o'clock.

Q. In the afternoon? A. P. M., yes, sir.

Q. Where did you first see her that day?

A. In Mr. McGuire's car.

Q. Where was that?

A. Parked in the street to the side of the hospital.

Q. What was done with her at that time?

(Testimony of R. B. Lindsey.)

A. We carried her into the hospital and put her to bed. [126]

Q. Did you make an examination of her at that time? A. Yes, sir.

Q. What did you find?

A. I found a very severe crushing of the chest and abdomen with evidence of internal injury.

Q. What happened to her?

A. She later died.

Q. Was that on the 16th of September that she died, if you know? A. Yes, it was.

Q. In your opinion, Doctor, what was the cause of her death?

A. Internal injuries to her chest and to the vital organs of the abdomen.

Q. Before that time had you had occasion to see her? A. Yes, sir.

Q. What was her condition as to her being a healthy woman?

A. She consulted me about three months previous to that time as to the treatment of a cold and her health other than the cold at that time was very good.

Mr. Davis: That is all, thank you, Doctor.

Cross Examination

By Mr. Smith:

Q. After you had placed Mrs. Newby in the hospital you examined her, did you?

A. Yes, sir.

Q. State briefly the extent of your examination.

A. A complete examination of the head, eyes,

(Testimony of R. B. Lindsey.)

face, mouth, neck and in fact a complete examination of the body, including the heart and lungs?

Q. Now, Doctor, did you make any examination of the contents of the stomach?

A. I didn't make a special examination of the contents of the stomach, but she vomited and I made just a gross examination of it.

Q. Doctor, in your opinion from the so-called gross examination of the contents of the stomach, in your judgment and in your opinion was there any presence of an alcoholic condition?

A. I would say that it was my impression that there was.

Q. How long was it after she was placed in the hospital that you had the opportunity of observing the contents of the stomach and what occurred which gave you that opportunity?

A. That was within about five minutes after she was in the hospital.

Q. What occurred which afforded you that opportunity?

A. She became very nauseated and vomited.

Q. You had an opportunity to examine her mouth and to detect any odors on her breath?

A. Yes, sir.

Q. What in your opinion, based on that examination as to whether or not there was the presence of alcoholic odor on her breath? [128]

A. I can state that there was an odor which gave me the impression of being similar to alcohol.

Q. You have had experience,—strike that—how

(Testimony of R. B. Lindsey.)

many years have you been practicing as a physician and surgeon? A. Thirteen years.

Q. And you have had experience with alcoholism? A. Yes, sir.

Q. Had experience with the odor of alcohol?

A. Yes, sir.

Q. To what extent were you able to detect the odors of alcohol from the source which you testified to, in your opinion?

A. State that again, will you please?

Q. To what extent, that is, whether or not the odor was strong or weak?

A. I would say it was moderate.

Q. What do you mean by moderate?

A. In detecting the odors of alcohol you have several ways of determining the strength of the odor,—whether you can detect exactly what the alcoholic content was or where it came from or whether it is rather obscure and not predominant in any one respect.

Q. Then there was a pronounced smell of alcohol, an odor of alcohol?

A. There was an evident odor. [129]

Mr. Smith: That is all.

Redirect Examination

By Mr. Davis:

Q. Did you make any chemical analysis of the contents of this lady's stomach?

A. No, because I was interested in only whether the contents contained blood.

(Testimony of R. B. Lindsey.)

Q. Did you mean to say that the lady had been drinking intoxicating liquor?

A. No, I didn't make that statement.

Q. Then alcoholic odor can come from a person's stomach content without their drinking intoxicating liquor?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. Yes, it may.

Q. And that might be the cause here in this case? A. Yes, sir.

Q. Did you mean to say, or do you say now that this lady had been drinking intoxicating liquor?

A. No, sir.

Mr. Davis: That is all, Doctor.

Recross Examination

By Mr. Smith:

Q. And you did not mean to testify that she had not been drinking alcohol beverages.

A. I am not forming any opinion on that. [130]

Q. You say that the odor might come from the contents of the stomach without any alcoholic beverage?

A. Yes, sir, since you put it beverage, yes.

Q. Do you say—

A. —alcohol or an alcoholic odor may come from medicine for one thing—

Q. —Do you know whether she had any medicine or not? A No, sir, I don't know.

Q. She was your patient?

A. Three months before for a minor cold.

(Testimony of R. B. Lindsey.)

Q. She had no occasion to visit you during the intervening three months? A. No, sir.

Q. There was a definite alcoholic odor on her breath?

A. Well, I would interpret the odor as that, I guess.

Mr. Smith: That is all.

Mr. Davis: Yes, that's all.

ALTON P. BUNDERSON,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Alton P. Bunderson.

Q. Where do you reside?

A. Paris, Idaho. [131]

Q. How long have you resided there?

A. Five years.

Q. What position do you hold in Bear Lake County, if any, that is, official position?

A. Sheriff.

Q. Were you the Sheriff of Bear Lake County on September 11, 1942? A. Yes, sir.

Q. Prior to the time you became Sheriff had you had any experience in police work?

(Testimony of Alton P. Bunderson.)

A. Yes, sir.

Q. What was that?

A. On the State Police force.

Q. How long were you a State police?

A. Two years prior to that.

Q. Did you attend any officer's school, or what they term training schools, as an officer?

A. Yes, sir.

Q. When you were a State Police?

A. Yes, sir.

Q. Did you ever see the gentleman sitting there by Mr. Merrill, reading the transcript?

A. Yes, sir.

Q. Where did you first see him?

A. In Montpelier.

Q. When did you first see him Mr. Bunderson?

A. I think it was about the 13th of September, 1942.

Q. Did he introduce himself to you?

A. Yes, sir.

Q. Who did he say he was?

A. He passed me his card introducing himself and said that he was a representative of the Tobacco Company.

Q. That card was introduced in evidence here before

A. Yes, sir.

Q. The Bailiff has handed you a card, now, Mr. Bunderson, was that the card that was handed to you by this man?

A. Yes, sir.

Q. By the gentleman sitting here?

A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Mr. Davis: We ask that it be marked as an exhibit.

The Court: It may be marked as Exhibit 1.

Mr. Davis: I offer Exhibit 1 in evidence at this time.

Mr. Smith: We have no objection.

The Court: It may be admitted.

Q. At about that time did you see Mr. Rulon D. Hair who sits here by Mr. Black, his counsel?

A. Yes, sir.

Q. Where did you see him?

A. At Montpelier.

Q. What time of day was that?

A. That was in the evening. [133]

Q. Did Mr. Donnelly make any statement to you as to why he came to Montpelier, and what he was doing there?

A. I don't remember.

Q. During that day were you advised of an accident on the highway?

A. Yes, sir.

Q. Where were you when you were advised of that?

A. In front of the Police Station in Montpelier.

Q. What time of the day was that, approximately?

A. A little after five.

Q. What did you do?

A. I went to the scene of the accident.

Q. Where was the scene of the accident?

A. Approximately eighteen or twenty miles from Montpelier, north, on the highway.

Q. When did you,—strike that please,—what

(Testimony of Alton P. Bunderson.)

did you find when you got to the scene of the accident?

A. I found an automobile on its back.

Q. On its back? A. Yes, sir.

Q. What kind of automobile was it?

A. It was a 19— well, I don't know the year, but it was a Chevrolet.

Q. Truck or passenger car?

A. A panel job.

Q. What was the contents of that panel job, what was in it or what had been in it? [134]

A. Tobacco.

Q. Was there any writing or printing on it?

A. Yes, sir.

Q. Do you recall what it was? A. No, sir.

Q. Did you have some pictures taken of that truck? A. Yes, sir.

Q. When was that? A. The next day.

Q. Where was that, where were they taken?

A. At Montpelier.

Q. Would you recognize those pictures?

A. Yes, sir, if I saw them I would.

Q. Now, do you know what was done with the truck from the time you saw it on its back until this picture was taken?

A. Do I know what was done with it?

Q. Yes, was it moved? A. Yes, sir.

Q. Where to? A. Montpelier.

Q. The picture which you have in your hand is that one of the pictures that you requested to be taken? A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Q. And was taken the next day after the accident? A. Yes, sir.

Q. Is that a fair representation and likeness of the truck [135] that you found at the scene of the accident?

Mr. Merrill: Objected to as leading and no proper foundation is laid, and it calls for a conclusion.

The Court: Sustained.

Q. Is that a picture of the truck which was found by the roadside, up-side-down, and moved to Montpelier?

Mr. Merrill: Objected to on the same ground, it is leading and calls for a conclusion and it is entirely without foundation.

The Court: He may answer.

Mr. Davis: Did the Court rule?

The Court: He may answer.

A. Yes, sir.

Mr. Davis: We offer this picture in evidence and I can say to the Court that it will be connected up.

Mr. Merrill: Objected to as there is no proper foundation laid for such evidence.

The Court: I will sustain the objection.

You may offer it again after you have connected it up.

Q. Now, Mr. Bunderson, who did you request to take the pictures which are marked two, three and four?

(Testimony of Alton P. Bunderson.)

A. Mr. Grey, the local photographer at Montpelier.

Q. Do you know where the truck was when they were taken?

A. At the Ford Garage at Montpelier.

Q. And were those pictures then given to you?

A. Yes, sir. [136]

Q. When you arrived at the scene of the accident what did you do?

A. I first looked the automobile over to see if there was anybody around and then continued my investigation.

Q. Who was with you?

A. Mr. Bruce and Mr. Coughlan.

Q. Did you make any measurements on that examination? A. Yes, sir.

Q. What were the measurements made with?

A. Tape.

Q. What kind of a tape?

A. Steel tape.

Q. Were the tracks leading to the scene of the accident plainly visible? A. Yes, sir.

Q. What kind of road was it? A. Oil.

Q. Who helped you with the measurements?

A. Mr. Bruce.

Q. Was the road straight at that place?

A. It was straight, yes.

Q. For how far,—for what distance was it straight?

A. For a half mile both ways from the truck.

(Testimony of Alton P. Bunderson.)

Q. Was there anything to obstruct the view of the driver?

A. Only that the road is a little wavey,—up and down.

Q. At the time you made the measurements, did you set down [137] the measurements on a rough plat?

A. Yes, sir.

Q. While you were at the scene of the accident?

A. Yes, sir.

Mr. Davis: We ask to have the plat marked as Exhibit 5.

The Court: Yes, it may be so marked.

Q. Are you familiar with what I have had marked as Exhibit 5 without having it handed to you?

A. Yes, I think so.

Q. Mr. Bunderson, when was this drawing on this exhibit made, when were these made?

A. At the time I measured the distances.

Q. And when were the distances put down?

A. At the same time.

Q. Where did you commence the measurement,—that is, where did you commence measuring from the point where you found the automobile?

A. North.

Q. The automobile was traveling in what direction?

A. South.

Q. What did the tracks show? What was the first thing you saw in reference to the tracks commencing north from the scene of the accident?

A. From the automobile I walked up the road to where the tracks left the oil.

(Testimony of Alton P. Bunderson.)

Q. That is where you started to measure? [138]

A. Yes, sir.

Q. What did the tracks show from there? Which side of the road did they leave?

A. The west side.

Q. How far did they travel off the oil?

A. I don't know.

Q. You mean that you would have to exhibit to state? A. Yes, I would.

Q. Now, how far did the tracks travel off the oil?

A. 117 feet.

Q. When they left the oil first?

A. Yes, sir.

Q. What was the course of the tracks then?

A. They came back on the oil and stayed on the oil, crossed it, 177 feet and then left the east side and stayed off the oil again for 166 feet, and then came back on the oil and stayed on the oil for 146 feet, going off the west side again and stayed off for 66 feet and then came back on the oil and stayed on the oil for a distance of 92 feet.

Q. Then when they left the oil after this distance of 92 feet where did the tracks go then?

A. Down into the borrow-pit, and then out in the open country there.

Q. What distance?

A. Eighty-two feet. [139]

Q. What did you find at the end of that distance? A. The automobile.

Q. Were these tracks plainly visible?

A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Q. Did they remain visible for some time?

A. Yes, sir.

Q. How long did they remain visible?

A. They were there when I left.

Q. Were they still visible at a later date?

A. I never noticed.

Q. During the time you made this examination did Mr. Hair appear there? A. Yes, sir.

Q. Where was he?

A. He came with the wrecker.

Q. Were you making the examination and measurements while he was there? A. No, sir.

Q. Had you completed them? A. Yes, sir.

Q. Did you have a discussion with him at that time at all?

A. I talked to him but I don't know now what we talked about.

Q. Was there any discussion as to why you were there? A. Not that I remember.

Q. You don't recall whether you told him that you made measurements? [140] A. No, sir.

Q. What did you do as to any property there at the scene of the accident?

A. We uprighted the car and gathered up the merchandise and throwed it back in the truck.

Q. What was that merchandise?

A. There was cigarettes and chewing tobacco.

Q. What kind of cigarettes? A. Camels.

Q. Do you recall what kind of chewing tobacco it was? A. No, I don't.

(Testimony of Alton P. Bunderson.)

Q. What was the fact as to whether car was loaded or not? A. Yes, it was.

Q. It was loaded. A. Yes, sir.

Mr. Davis: Now I would like to point out to the witness different markings on this exhibit. May I approach the witness?

The Court: Yes, you may do that.

Q. Mr. Bunderson, starting here at the two there are two figures,—there are three figures 238; 123 and 714—did you make those? A. Yes, sir.

Q. Here are the figures 238 and the word steps. Did you make those figures and put the word on there? A. Yes, sir. [141]

Q. 640 here (indicating). Did you make that? A. Yes, sir.

Q. What was that, or what does it indicate?

A. That was the time I finished the investigation.

Q. Right here is the following: “all done with the investigation 9-11-42:” Did you put that there?

A. Yes, sir.

Q. And “twenty miles north of Montpelier.” That is in your hand writing? A. Yes, sir.

Q. License Number 3A150 C 1941 Chevrolet. Are those also your figures? A. Yes, sir.

Mr. Merrill: We must object to these leading questions.

The Court: I understood that he was just identifying the exhibit.

Mr. Merrill: He can do that without these leading questions.

(Testimony of Alton P. Bunderson.)

The Court: Proceed, Mr. Davis, without leading the witness.

Q. Here is some writing here (indicating). Did you write that? A. Yes, sir.

Q. What is that?

A. Culvert 100 650 414 plus 15. [142]

Q. Is that your writing? A. Yes, sir.

Q. You wrote it, did you? A. Yes, sir.

Q. Here is an illustration, who made that?

A. I did.

Q. What is that?

A. That is the way I diagram an automobile.

Q. Does that cover the writing you can see here (indicating). A. Yes, sir.

Q. And what is that, Mr. Bunderson?

A. That is an arrow pointing north and the word north.

Q. These two lines; what do they represent?

A. The edge of the oil. The width of the oil road.

Q. The figure here (indicating) and line running this way. What does that represent?

A. That is 117 feet.

Q. And what does that represent?

A. The measurement from the first time it left the oil until it returned to the oil.

Q. Does it indicate the Course of the road or not? A. No, sir; it does not.

Q. Do you see any other marking that you have not explained?

(Testimony of Alton P. Bunderson.)

A. No, I don't think so. I believe that's all.

Q. Now will you explain why you used this paper. How you happened to use this piece of paper for making this diagram? [143]

A. Yes, I can explain that.

Q. Why was it?

A. That was the only piece of paper I had in the automobile to make any diagram on at that time.

Q. That is not made to scale, is it?

A. No, sir.

Q. Mr. Davis: We offer this exhibit in evidence at this time as exhibit 5.

Mr. Merrill: It is objected to as incompetent, irrelevant and immaterial and not properly identified and not proper to be admitted; it is not an accurate representation of things on the ground; and contains considerable matter pertaining to things not having to do with this controversy. Particularly the matters on the back of the piece of paper.

The Court: It may be admitted, but in admitting this there are certain printings in red on the back which are not to be considered by the jury as they have nothing to do with the matter before you at this time.

Q. Mr. Bunderson, in explaining the drawing would it be easier, if you are permitted to explain it from a larger plat, one on which you can point out the objects and the measurements rather than the one just admitted in evidence?

(Testimony of Alton P. Bunderson.)

A. I think so.

Q. Now you have been handed exhibit marked 6. Did you prepare that? [144]

A. No, sir.

Q. For the purpose of illustration is that clearer and would you be better able to explain that measurement and the course of the car from the drawing that is now in your hands?

Mr. Merrill: Objected to as calling for a conclusion of the witness. The evidence already shows that it is a purported enlargement of the exhibit introduced. It is wholly immaterial for any purpose. He testified that he didn't prepare it. It is simply a copy and not an original instrument.

The Court: I will permit you to examine him further on this.

Q. Does that show the distance the same as you have testified from your exhibit and does it show the course of the automobile in accordance with the distances set out in your exhibit?

Mr. Merrill: We object to that. It is immaterial and is merely an attempted re-statement of what has gone in before.

The Court: He may answer.

A. Yes, sir.

Mr. Davis: We offer this exhibit for the reason that it makes the matter more understandable and can be better explained than from the other exhibit. We offer it as a rough draft to permit the witness to [145] explain to the Court and the jury the course of the automobile in accordance with his plat.

Mr. Merrill: We object to it as not properly

(Testimony of Alton P. Bunderson.)

identified. It is only a copy of an exhibit already in evidence. There is no apparent reason for encumbering the record with it. This witness didn't prepare it. It is wholly immaterial.

The Court: The witness has testified that it does show all that is on the small exhibit. Just for the purpose of allowing the witness to explain to the jury, on the exhibit, the tracing of the course of the car. I will admit it for that purpose. It would be quite difficult to point out to the jury on the smaller map the measurements. I will permit it to be introduced for that purpose only.

Mr. Merrill: May I ask the witness a few questions regarding this exhibit?

The Court: Yes.

Q. By Mr. Merrill: You didn't prepare this?

A. No, sir.

Q. You don't know whether it is accurate or not?

A. No, sir; I don't.

Q. You don't know whether this marking of the highway is accurate or not?

A. No, sir.

Q. You don't know whether the distance off the highway shown [146] on this by these markings is correct?

A. No, sir; I don't know.

Q. You don't know anything about the scale, whether the distances are true to the scale?

A. No, sir.

Mr. Merrill: We think it is abundantly proven that it would be misleading and would be objectionable on that ground. We object on that ground as well as on the other grounds mentioned. There is

(Testimony of Alton P. Bunderson.)

considerable on there that is not on the other exhibit.

The Court: I understood you to say this was an illustration of the condition of the highway at the time and place you made the examination?

A. Yes, sir.

The Court: And the distance line showing the course of the car and the distance is correct? Rather it is the same on both exhibits?

A. Yes, the numbers are the same. I don't know about the scale.

The Court: This may be admitted as an illustration of the testimony of the witness, not as proving or disproving any issue in this case.

Q. By Mr. Davis: Now, Sheriff, if you will please come down here. Now, if you will approach this black-board and stand to one side. Will you show on the exhibit where you first commenced your measurement? [147]

A. Right here (indicating).

Q. What does that dotted line indicate?

A. I imagine the tracks I measured.

Mr. Smith: That is objected to as a conclusion of the witness and we ask that it be stricken.

The Court: It may be stricken.

Q. Show us the distance and the course that the tracks went,—the distances you have testified to.

A. (Indicating): This is the first place it left the oiled surface and it stayed off the oil for 117 feet and came back on the oil from the west side

(Testimony of Alton P. Bunderson.)

of the oil, to where it left the oil again was 177 feet and then it stayed off the oil for 166 feet and came back to cross the oil again to where it left on the west side 146 feet farther south. It stayed off the oil on the west side for 66 feet and then came back across the oil for 92 feet and then went off the other edge of the highway, the east edge, and from the east edge of the highway to where the automobile was is 82 feet.

Mr. Davis: Now you may take the stand again.

Q. Had your measurements been completed before the truck was moved? A. Yes, sir.

Q. How was it moved?

A. By the wrecker.

Q. Do you know who had the wrecker?

A. Yes, sir. [148]

Q. Who was that? A. Carl Oxenbine.

Q. Who was with Mr. Oxenbine?

A. Mr. Hair.

Q. Anyone else with Hair that you know of?

A. No, sir.

Q. When you examined the road where the tracks where the truck first went off the oil road?

A. Yes, sir.

Q. What did you find there?

A. I found the shoulder of the road was wet.

Q. What was the depth of the depression, do you know, where the car went into the ground?

A. No, sir.

Q. Was it plainly visible? A. Yes, sir.

Q. Did you examine the tracks along there?

(Testimony of Alton P. Bunderson.)

A. Yes, sir.

Q. Did you find any rocks or other objects there in the tracks? A. No, sir.

Q. You examined all the tracks carefully?

A. Yes, sir.

Q. Now, Mr. Bunderson, with reference to the pictures,—the first picture,—what is the number of that? A. This is number 4.

Q. Does that picture fairly represent and is it a fair likeness [149] of the truck you found along the highway?

Mr. Smith: Objected to as leading and it is repetition.

The Court: He may answer.

A. Yes, sir.

Mr. Davis: We now offer it in evidence.

Mr. Merrill: We object to it as not properly identified and it is immaterial.

The Court: It may be admitted.

Mr. Merrill: May I ask a question or two regarding this exhibit?

The Court: Yes, Mr. Merrill, you may ask.

Q. By Mr. Merrill: Do you know whether or not,—strike that,—do you know where this purported photograph was taken?

A. Yes, sir.

Q. Where?

A. The Ford Garage, Montpelier.

Q. Were you there? A. No, sir.

Q. Do you know whether or not it shows the true condition of that car?

(Testimony of Alton P. Bunderson.)

A. As much as I know about it, it does.

Q. Does it show the true condition?

A. So far as I know.

Q. Don't you know that the right front tire was blown out? A. No, sir. [150]

Q. Do you know that the right front tire was flat? A. Yes, sir.

Q. I call your attention to that fact, and ask you whether it shows that tire flat?

A. No, but there is a jack under it.

Q. That is the reason that it doesn't show it?

A. Yes, that's right.

Q. Anything else that is different?

A. Not that I notice.

Q. You were not there when the photograph was taken? A. No, sir.

Q. The car was then a good many miles from the scene of the accident. A. Yes, sir.

Q. Do you know how many days passed before it was taken? A. No, sir.

Q. Do you know who was there when it was taken?

A. I just know that I received the picture.

Q. And that is all you know?

A. That's all.

Q. You don't know what work had been done by the mechanics at that time? A. No, sir.

Q. Or how they had moved it around?

A. No, sir.

Q. Or whether they had been hammering on it, or working [151] on it in any way?

(Testimony of Alton P. Bunderson.)

A. No, sir.

Mr. Merrill: Now we object on the further ground, Your Honor, that it cannot be shown that this is a true representation. He admits that it is jacked up and he also admits that he wasn't there when this picture was taken.

The Court: He has testified that it was a true representation as he observed it at the time of the wreck.

Mr. Merrill: Under cross-examination he has shown that it is not a true representation.

The Court: Should your motion be to strike the exhibit at this time?

Mr. Merrill: Perhaps so. If it is introduced, I move to strike it as not a true representation and not properly identified.

The Court: I will take this under advisement and I think we will recess until 10 o'clock in the morning.

10 O'clock A.M., March 20, 1945

The Court: The motion to strike the exhibit will be overruled.

Q. Now, Mr. Bunderson, you have been handed what is marked as exhibit 5. You have heretofore stated that you requested that the pictures be taken immediately [152] after the accident.

A. The next day.

Q. Now, does that represent and is it a fair likeness of the car as it appeared at that time?

A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Mr. Davis: We offer it in evidence.

Mr. Merrill: Objected to as not properly identified.

The Court: Admitted.

Mr. Davis: I think I referred to that as exhibit 5. I think I should have said exhibit 2. May that be corrected.

The Court: Yes, if it is number 2.

Mr. Davis: I would like to have number two handed to the jury and number three handed to the witness.

Q. Does that picture marked exhibit 3 represent and is it a fair representation and likeness of the car as it appeared at that time?

A. Yes, sir.

Mr. Davis: We offer that in evidence.

Mr. Merrill: The same objection as made to the former exhibit.

The Court: The same ruling.

Q. Mr. Bunderson, have you had occasion to become familiar with and have you traveled the road between Montpelier [153] and Soda Springs the last few years? A. Yes, sir.

Q. Are you familiar with the highway from what is called the underpass, east of Soda Springs, over to Montpelier? A. Yes, sir.

Q. What is the fact as to whether there are any main roads crossing the highway this underpass and the point of the accident?

A. Not that I know of.

Mr. Davis: That's all, Mr. Bunderson.

(Testimony of Alton P. Bunderson.)

Cross-Examination

By Mr. Merrill:

Q. Do you know what counsel meant by main roads?

A. I understand main roads to be other than farm roads.

Q. But there are a number of those roads.

A. Yes, sir.

Q. There are a number of side-roads leading off to various properties along the highway?

A. Yes, sir.

Q. They were scattered all along there?

A. Yes, sir.

Q. Some of them graveled roads?

A. Yes, sir.

Q. Very well defined roads? A. Yes, sir.

Q. How far is the underpass from Soda Springs? [154]

A. I would say about a mile or a mile and a half.

Q. How far was the scene of the accident from the underpass?

A. I estimate it about six or seven miles.

Q. Do you know how far the County line is from Soda Springs? A. No, sir.

Q. You never made any study of that?

A. No, sir.

Q. Don't you know it is about ten or twelve miles from Soda Springs? A. Could be.

Q. This accident happened near the County line, just over the County line?

(Testimony of Alton P. Bunderson.)

A. A couple of miles over.

Q. You never made any examination as to where it was,—that is, the distance from the underpass to the county line?

A. I estimated it about seven miles but it could be more.

Q. I am calling your attention to exhibit 5. Do you know what that is? A. Yes, sir.

Q. What is it?

A. Sketch of the place of the accident?

Q. Made by you? A. Yes, sir.

Q. When did you make it?

A. At the time I was investigating,—investigating the accident. [155]

Q. What did you do with the sketch?

A. I kept it in my car.

Q. Did you ever make a copy of it and send it to the State Department of law enforcement?

A. I think I did.

Q. Do you know that you did?

A. I can't remember that.

Q. Did you keep a copy in your office?

A. I don't remember.

Q. Isn't it common practice to keep a copy?

A. Either notes or a copy.

Q. Did you keep a copy in this instance of what you sent to the State Department?

A. I don't remember.

Q. What time of the day did you get out to the scene of the accident?

A. I would say around five o'clock.

(Testimony of Alton P. Bunderson.)

Q. What time did you say the accident happened? A. I wouldn't know.

Q. Did you make a report as to the time of the accident? A. Not as to the time.

Q. Following the accident you made a report?

A. Yes, I did.

Q. What did you say in that report as to the time of the accident? A. I can't remember.

Q. You can't remember. A. No sir.

Q. You know that it was at 4:30.

A. I don't know that.

Q. Who went out with you to the scene of the accident?

A. Mr. Willard Bruce and Mr. Glen Coughlan.

Q. Glen Coughlan is one of the attorneys for the plaintiffs, who is not here at this time?

A. Yes sir.

Q. Did Mr. Coughlan assist you in making this sketch, exhibit number 5?

A. No, I don't think he did.

Q. He was there? A. Yes sir.

Q. And discussed it with you?

A. Yes sir.

Q. Did he help step off these measurements?

A. No sir.

Q. Who stepped off these measurements?

A. I did.

Q. You did. A. Yes sir.

Q. How many feet do you take to the step?

A. I wouldn't know.

(Testimony of Alton P. Bunderson.)

Q. You have on this map, exhibit 5, 238 steps, what does it mean? [157]

A. That means the steps I took between the point of where the car left the highway first, and last left the highway.

Q. Did you step this 177,—that means steps or feet?

A. Feet.

Q. Did you step that off?

A. No sir.

Q. Why did you put 238 steps on this map?

A. After I made the measurements I walked down the road, I took the number of steps as I walked down there and I put that notation down.

Q. Why didn't you measure it?

A. I didn't think it was essential as far as the investigation was concerned.

Q. Was there a yellow line on this highway?

A. Yes sir.

Q. All the way?

A. Yes sir.

Q. When did you come to that conclusion?

A. After the last Court.

Q. Is that line all the way from Soda Springs to Montpelier?

A. No sir.

Q. Where is this yellow line?

A. The center of the road.

Q. What distance?

A. I don't know.

Q. That is a straight road? [158]

A. Yes sir.

Q. It is several miles from any town?

A. Yes sir.

Q. What reason can you ascribe for the yellow line?

A. They do it all over the state.

(Testimony of Alton P. Bunderson.)

Q. Why in an outlying road like that?

A. I don't know.

Q. Why didn't they do it the whole distance?

A. I don't know.

Q. Why was the yellow line at this spot?

A. I don't know.

Q. What was the charatcer of the road at this spot?
A. Hilly.

Q. Was it level or did it have raises and curves?

A. It was straight but up and down.

Q. What do you mean by that?

A. It was wavey, up and down.

Q. It has crests, and for about a half mile there it was up and down?
A. Yes sir.

Q. So it wasn't level during that space or distance there?
A. No sir.

Q. How deep were these basins in between the crests?
A. I don't know.

Q. You didn't give that any consideration?

A. No. [159]

Q. If an automobile was down in the bottom of one of these basins could anyone over the crest see it?
A. I think you could.

Q. Did you make such an investigation?

A. No sir.

Q. Did you measure the width of the highway?

A. Yes sir.

Q. How wide is it?

A. Eighteen feet eight inches.

Q. How much of that was oil?

A. That is the oil.

(Testimony of Alton P. Bunderson.)

Q. The eighteen feet eight inches is oil?

A. Yes sir.

Q. How wide were the shoulders?

A. The shoulders?

Q. Yes, from the edge of the oil to the edge of the shoulder.

A. About five feet.

Q. On each side.

A. Yes sir.

Q. Of what were the shoulders constructed?

A. Gravel surface.

Q. Did you examine these shoulders?

A. Yes sir.

Q. Did you observe in the shoulders that there were ruts?

A. No sir.

Q. Didn't you observe any ruts at all, or indications of a car having come along on the shoulder and made an [160] impression along that shoulder?

A. Yes sir.

Q. How deep were those impressions?

A. I don't know.

Q. Two or three inches?

A. I wouldn't say.

Q. There was quite a marked indication of a car wheel having been along there?

A. Yes sir.

Q. It had been raining.

A. Yes sir.

Q. That was along the west side?

A. Both sides.

Q. Along the west side how far was it that the wheel had made an impression in the soft shoulder?

A. I think 177 feet if I remember that.

(Testimony of Alton P. Bunderson.)

Q. That first one was how far?

A. I don't know. It is on the plat there.

Q. Is the 117 feet? A. I guess it is.

Q. During that 117 feet there was a perceptible indentation showing a car wheel to have been traveling along an impressed rut in the shoulder?

A. Yes sir.

Q. That was observable to have been made by this particular car? [161] A. Yes sir.

Q. It was raining and muddy?

A. It had been raining.

Q. It was muddy? A. Yes sir.

Q. The oil is much harder than the soft shoulder? A. Yes sir.

Q. There is a perceptible hardness on the oiled portion of the road as you come from the shoulder onto the oiled portion? A. Yes sir.

Q. Sometimes that is rugged? A. Yes sir.

Q. You observed tracks along the roadway on the shoulder? A. Yes sir.

Q. Your wheel went,—strike that,—the wheel then went on the oiled portion of the road?

A. Yes sir.

Q. And if it got off it made this track again?

A. Yes sir.

Q. Have you observed, or did you observe at the time of your examination of the car that the right front wheel had a blown out tire?

A. It was down, I don't know what happened to it.

Q. Your examination didn't go that far?

(Testimony of Alton P. Bunderson.)

A. No sir, I wouldn't have known what caused it. [162]

Q. Did you examine the car?

A. I looked at it.

Q. You saw this wheel was flat?

A. Yes sir.

Q. I mean the tire? A. Yes sir.

Q. That was the right front tire?

A. Yes sir.

Q. How long were you out there at that time?

A. I would say approximately an hour or an hour and a quarter.

Q. You and Mr. Coughlan and Mr. Bruce?

Q. Mr. Hair came out with Mr. Oxenbine?

A. Yes sir.

Q. While you were there? A. Yes sir.

Q. And they looked over the scene?

A. Yes, sir.

Q. You know Mr. Oxenbine? A. Yes, sir.

Q. He examined the car?

A. He looked the car over.

Q. Did you see them take the car back?

A. Yes, sir.

Q. To Montpelier? A. Yes, sir.

Q. Did you stay until after the car was taken or did you [163] leave before they did?

A. I think I left after.

Q. How long after? A. I don't know.

Q. Did you go out with Mr. Coughlan or did he go with you? A. He went with me.

Q. Whose car did you drive? A. My own.

(Testimony of Alton P. Bunderson.)

Q. I think you said that you had some discussion with Mr. Donnelly about this accident?

A. Yes, sir.

Q. Where did you have this discussion?

A. I don't remember but I think in the police station for one place.

Q. Where is the police station?

A. The police station in Montpelier.

Q. Whereabouts in Montpelier, is it in the City building?

A. No, it is a building back of Mack's cafe.

Q. When did you have this conversation?

A. I think it was the 13th.

Q. Was that the time he handed you his card as you said?

A. Yes, sir.

Q. Did you discuss the accident at that time?

A. Yes, sir.

Q. You had made out some reports?

A. Yes, sir. [164]

Q. We are handing you proposed defendant's exhibit 8, does that bear your signature?

A. Yes, sir.

Q. It is not a complete report is it?

A. No, sir.

Q. Did you send that report in to the State Department?

A. I think I did.

Q. Did you send one like it?

A. I think so.

Q. Was it an exact duplication of that report or did you have something else on it?

A. I think I sent two in.

(Testimony of Alton P. Bunderson.)

Q. You are handed defendant's exhibit 7, and I will ask you if you know what that is?

A. Yes, sir.

Q. What is it?

A. That is a report of the wreck.

Q. Did you send the original of that to the Department? A. Yes, sir.

Q. Now, Sheriff, when were these reports made out?

A. I believe it was the next day. The 12th of September.

Q. Who was present when they were made out?

A. Mr. Hair and Mr. Dunn.

Q. Who is Mr. Dunn?

A. City Police Officer and myself.

Q. The three of you made out the report? [165]

A. Just the two of us.

Q. Mr. Dunn had nothing to do with it?

A. No, sir.

Q. These are exact copies of the reports you sent to the State Department?

A. This one is.

Q. What do you mean when you say this one,—

A. Well I think I sent the original of this report, the original on number 7 but I am not sure about this.

Q. These are exact copies. You had a copy in your office? A. Yes, sir.

Q. They were in your office for a long time?

A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Q. They represent what you thought to be the cause of the accident at that time?

A. Yes, sir.

Mr. Merrill: We offer exhibits 6 and 7 in evidence.

Mr. Davis: I think they are exhibits 7 and 8.

Mr. Merrill: Yes, 7 and 8.

Mr. Davis: No objection.

The Court: They may be admitted.

Mr. Merrill: I will want to read portions of this exhibit, perhaps not now, but I don't want the statute to go against me on this.

The Court: It might be agreeable to stipulate.

Mr. Davis: It is agreeable with me that he can read it at any time he wants and he may read any part he wants.

Q. These blanks are blanks provided for the Sheriffs by the State department of law enforcement?

A. Yes, sir.

Q. They were furnished to you?

A. Yes, sir.

Mr. Merrill: Now I will read a part of this exhibit 7. On this exhibit there appears the following: "Describe the accident. Also use this space for data on third vehicle. Additional witnesses or injured persons and explanation of questions not fully answered by checking in the boxes provided. While traveling south on highway 30 N. and 22 miles north of Montpelier I met a semi-truck trailer riding a little over the yellow line, in order to pass I rode my two right wheels on the

(Testimony of Alton P. Bunderson.)

shoulder which was soft with rain which put my car out of control. While it was out of control I hit a rock blowing my right front tire and causing my car to roll over. Signature R. D. Hair”.

Q. Now, did Mr. Donnelly ask you how the accident happened?

A. I don't remember what was said about that.

Q. Did he ask you how the accident happened?

A. I imagine he did but I don't remember that.

Q. Where did you have the conversation with him? [167]

A. I had several. I talked to Mr. Donnelly three or four times.

Q. That is what I want to know. You said that you had a conversation with him on the 13th of September? A. Yes, sir.

Q. Where was that conversation?

A. I think at the police station.

Q. What other conversation did you have?

A. I don't remember that.

Q. Did you have others?

A. Yes, I talked and visited with him.

Q. Whereabouts?

A. In two or three places.

Q. You don't remember anything as to what was said in any of those places? A. No, sir.

Q. Who was present at the police station besides yourself and Mr. Dunn.—was Mr. Dunn present when Mr. Donnelly was there?

A. I don't remember that.

(Testimony of Alton P. Bunderson.)

Q. Do you remember whether the Chief of police was present? A. No, sir, I don't.

Q. Well, now Sheriff, didn't Mr. Donnelly ask you your version of the accident, how it happened?

A. Not that I remember.

Q. Didn't he ask you how the accident happened? [168]

A. He might have done but I don't remember anything about that, I know we talked about the accident.

Q. What did you talk about?

A. About the accident.

Q. Did he ask you how it happened?

A. I don't remember that.

Q. Did he ask you if you had been out to see the car? A. I don't remember that.

Q. Did he ask if you had been to the scene of the accident?

A. I don't remember that either.

Q. Well, what did he ask you?

A. I don't remember what he said but I know that we talked about the wreck.

Q. Isn't it true at that time and place, on Sunday the 13th of September 1942 in the afternoon of the day at the office of the Chief of Police in Montpelier, yourself and Mr. Donnelly being present; among other things Mr. Donnelly asked you how the accident happened and what caused the accident, to which you replied: "from looking over the tracks the car made it looked like the car had been crowded off the road on the soft shoulder and

(Testimony of Alton P. Bunderson.)

while Mr. Hair was trying to control the car while being on the soft shoulder, the right front tire had apparently hit a sharp object which threw the truck out of control from there on east until the car turned over." Didn't you tell him that at that time and place? [169]

A. No, sir, not that I remember.

Q. Would you say that you did or didn't?

A. I had no reason to say that.

Q. I am not asking that.

A. But I had no reason to say that.

Q. Would you say that you didn't?

A. I would say that I didn't.

Q. Did Mr. Donnelly ask about the accident?

A. Yes, sir.

Q. What did you tell him?

A. I don't remember.

Q. How do you remember other matter connected with this?

A. Conversations are rather hard to remember.

Q. You, as an officer, went out to make an examination of the accident? A. Yes, sir.

Q. And to gather the facts concerning it?

A. Yes, sir.

Q. Did you do your duty? A. I tried.

Q. You came back and were interviewed by someone interested in the matter?

A. Yes, sir.

Q. And he asked you about it?

A. Yes, sir. [170]

(Testimony of Alton P. Bunderson.)

Q. What did you tell him?

A. I don't remember.

Q. You haven't any recollection of having told him anything?

A. No sir, I didn't write it down.

Q. You sent it to the Department.

A. Not what Mr. Donnelly and I talked about.

Q. You sent to the Department a report containing in substance what Mr. Donnelly said to you and the things you said to him? A. No sir.

Q. Didn't you send a statement to the Department containing this: "While traveling south on Highway 30 North, and 22 miles north of Montpelier I met a semi-truck trailer riding a little over the yellow line. In order to pass I rode my two right wheels on the shoulder which was soft with rain which put my car out of control. While it was out of control I hit a rock blowing my right front tire and causing my car to roll over."

A. Yes sir.

Q. Now, that was your version of the accident?

A. That was Mr. Hair's version.

Q. You had an opinion of what the investigation showed? A. Yes sir.

Q. You had the information gained from the examination? A. Yes sir.

Q. You had that information when Mr. Donnelly talked to [171] you? A. Yes sir.

Q. And Mr. Donnelly asked about the accident?

A. I think he did.

Q. And how it happened? A. He might.

(Testimony of Alton P. Bunderson.)

Q. Now, do you remember having told him what I read to you? A. No sir.

Q. Isn't it likely that you told him what you transmitted to the State Department of Law Enforcement? A. I could have, yes.

Q. Isn't it likely that you told him the same story? A. Yes sir.

Q. Didn't you tell him what I read to you?

A. Not that I remember.

Q. What did you tell him?

A. I don't remember telling him that.

Q. Mr. Coughlin was with you on that day?

A. Yes sir.

Q. He is a close personal friend of yours.

A. Yes sir.

Q. He is the prosecuting attorney and you are the Sheriff? A. Yes sir.

Q. Of Bear Lake County? A. Yes sir.

Q. You have reviewed this a great deal since that time? [172] A. Very little.

Q. You have gone over it with the attorney for the plaintiffs? A. Yes sir.

Q. But you don't remember what was said to Mr. Donnelly? A. No sir.

Q. Except what you testified to on Direct examination? A. Yes sir, that's right.

Q. You don't remember telling Mr. Donnelly what I read to you? A. No sir.

Q. Do you know what a truck with a trailer is?

A. Yes sir.

Q. A semi-truck with trailer? A. Yes sir.

(Testimony of Alton P. Bunderson.)

Q. How wide are those vehicles?

A. Most of them are eight feet.

Q. If one of such vehicles was straddle the yellow line there wouldn't be much of the highway left?

A. No sir.

Q. If it was traveling north and met a car going south, it would be essential that the south traveling car be pushed off on the soft shoulder?

A. Yes sir.

Q. Now, Mr. Bunderson, you made an investigation showing the speed of the car?

A. Yes sir. [173]

Q. What did your investigation show as to the speed. I mean the speed of the Hair car?

A. I don't know. It is on my report.

Q. I hand you defendant's exhibit 8 that is the report you signed yourself I think.

A. Yes sir.

Q. Tell me from that what the speed of the Hair car was?

A. At the time of the accident or before?

Q. Both.

A. I marked the estimated speed before the accident at 40 miles an hour, and estimated speed at the moment of the accident at 30 miles an hour and the lawful speed at 40 miles an hour and the maximum speed under conditions prevailing 50 miles an hour.

Q. That was your report made to the department?

A. Yes sir.

Q. That was the fact as you discovered it then?

A. Yes sir.

(Testimony of Alton P. Bunderson.)

Q. And that is your understanding of it now?

A. Yes sir.

Mr. Merrill: That is all, you may take the witness.

Redirect Examination

By Mr. Davis:

Q. Did you make your investigation for the purpose of giving your version of this accident or giving the [174] physical facts as they appeared on the ground? A. The physical facts.

Q. Now, did Mr. Coughlan influence you in this matter?

Mr. Merrill: Objected to as calling for a conclusion of the witness?

The Court: He may answer.

A. No sir,

Q. Did Mr. Coughlan try to get you to do anything that wasn't in accordance with the facts?

A. No sir.

Mr. Merrill: That is objected to as leading and calling for a conclusion of the witness.

The Court: He has answered and it may stand.

Q. Mr. Coughlan was County attorney at that time? A. Yes sir.

Q. Where is Mr. Coughlan now?

A. I understand he is at Pearl Harbor.

Mr. Merrill: Objected to as immaterial.

A. The last word I had was that he was at Pearl Harbor.

Q. Who is he working for?

Mr. Merrill: Objected to as immaterial and calls for a conclusion and is prejudicial.

(Testimony of Alton P. Bunderson.)

The Court: I think you brought out that he was connected with this investigation. He may answer.

A. He is in the Navy. [175]

Q. Now, Mr. Bunderson, were the shoulders of this road any softer on one side than on the other?

A. Not that I noticed.

Q. Was the depression or impression that was made on the shoulders where the truck went off each side of the road the same, were they similar?

A. Yes sir.

Q. Was the oil any harder or more rugged on one side of the road than the other?

A. No sir.

Q. Now, Mr. Bunderson these reports exhibits 7 and 8 that were handed to you. This part of the writing here (indicating) that counsel read to the jury from this exhibit, whose hand writing is that in?

A. Mr. Hair's.

Q. Who is that signed that, right here, who is that signed by?

A. Mr. Hair.

Q. Did you write that at all?

A. No sir.

Q. Was that your version of how the accident happened?

A. No sir.

Mr. Merrill: Objected to, it would contradict the report he sent in.

The Court: He has answered the question.

Q. Did you give any measurements?

A. I think I did, yes sir. [176]

Q. Who gave you the information as to the speed that the car was going? I mean the speed prior to the accident?

A. Mr. Hair.

(Testimony of Alton P. Bunderson.)

Q. Who gave you the information as to the speed of the car at the time of the accident?

A. Mr. Hair.

Q. When you make a report is it customary for you to permit the participant to describe the accident in his own words? A. Yes sir.

Q. That doesn't mean that you approve of that?

Mr. Merrill: Objected to as leading and argumentative.

The Court: He may answer.

A. Oh. No.

Q. Did you intend to testify that you believed that, or that you made this report in accordance with what Mr. Hair stated here?

Mr. Merrill: Objected to as leading and calling for a conclusion and immaterial.

The Court: He may answer.

A. No sir.

Q. Is that your version of how the accident happened?

Mr. Merrill: We object to that as calling for a conclusion of the witness. It is leading and it attempts to put in evidence contrary to the report he made to the Department of law enforcement.

The Court: He may answer.

A. No sir.

Q. You were asked on cross examination that if a semi-trailer came along and certain things happened,—now do you know that a semi-trailer came along? A. No sir.

Q. Do you believe one did?

(Testimony of Alton P. Bunderson.)

Mr. Merrill: That is objected to as calling for a conclusion of the witness and it is a matter for the jury to determine.

The Court: That is a question of fact for the jury.

Q. Did Mr. Hair make any request of you to apprehend or find the person that drove that semi-trailer and truck? A. No sir.

Q. Did he ask to have that person arrested?

A. No sir.

Q. Did he give you any description of that truck? A. No sir.

Q. Were you ever asked by anyone to look for a semi-trailer or to find a semi-trailer and truck in connection with this accident? A. No sir.

Q. Now, Mr. Bunderson, you have been asked to state what Mr. Donnelly said and what you said. I will ask you if Mr. Donnelly was interested in any way with reference [178] to Mr. Hair's custody, if he told you at any time?

Mr. Merrill: Objected to as it calls for a conclusion of the witness and it is improper redirect examination.

The Court: It was gone into, he may answer.

A. No sir.

Q. I will ask you if the fact isn't that Mr. Donnelly told you that if you arrested Mr. Hair that he would be responsible for his appearance?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, leading and he has already answer that he didn't so ask him.

(Testimony of Alton P. Bunderson.)

The Court: He may answer.

A. Not that I remember.

Q. Was there some discussion about Mr. Hair being released after the accident?

Mr. Merrill: Objected to as leading.

The Court: Yes, it is leading but he may answer.

A. Not that I remember of.

Q. Now, Mr. Bunderson, do you now attempt to say or have you at any time attempted to say or do you mean by any report that you have filed that you intend to make the statement as to how this accident happened or what caused this truck to tip over?

Mr. Merril: Objected to as leading, calling [179] for a conclusion of the witness and usurps the function of the jury.

The Court: I think he may answer.

A. No sir.

Q. You just made the measurements and reported what you found out there, the physical facts.

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. Yes sir.

Mr. Davis: That is all.

Recross Examination

By Mr. Merrill:

Q. I believe you said that Mr. Coughlan was County Attorney at the time this accident happened?

A. Yes sir.

(Testimony of Alton P. Bunderson.)

Q. Is that a fact or is it a fact that Darwin Haddock was the County attorney at that time?

A. Well, now, I don't remember.

Q. Isn't it a fact that Darwin Haddock was County Attorney until the end of 1942 and that Mr. Coughlan was elected at the November election?

A. Did we have an election that fall?

Q. I am wanting to know if it wasn't a fact that Mr. Haddock was the County attorney or that you were out there with Mr. Coughlan the Prosecuting attorney?

A. I cannot say for sure.

Q. You don't know much about any of this?

A. No sir.

Mr. Merrill: That is all.

Redirect Examination

By Mr. Davis:

Q. You know that the figures you gave on that plat or map and shown there are true and correct figures of the distances you found at that time?

A. Yes sir.

Mr. Merrill: Objected as repetition.

The Court: It may be, but the answer is in and it may stand.

Mr. Davis: That is all.

The Court: We will recess for ten minutes.

10:00 a.m., March 20, 1945

Recross Examination

By Mr. Merrill:

Q. I think you said that there was a yellow line on the highway?

A. Yes sir.

(Testimony of Alton P. Bunderson.)

Q. Was there any other kind of line there?

A. Yes sir.

Q. What kind? A. A white line.

Q. Both white and yellow line on this strip of highway? A. Yes sir.

Q. What do they indicate?

A. If the yellow line is on your side then you should not pass a car. [181]

Q. Why?

A. A curve or some other reason.

Q. What does the white line indicate?

A. That you should not pass a car in the same direction.

Q. Then the white and yellow line indicate that you should not pass? A. Yes, sir.

Q. Indicates that the depressions are so deep that you cannot see a car or that there is a curve?

A. Yes, sir.

Q. That is the condition here?

A. Yes, sir.

Q. I think you said that the depressions or basins were not deep enough so that you couldn't see another car?

A. I think I said I didn't know.

Q. You do remember there was a white and yellow line? A. Yes, sir.

Q. Do you remember whether the road was straight or curved? A. It was straight.

Q. But up and down?

A. It was up and down.

(Testimony of Alton P. Bunderson.)

Q. Do you remember the depth of those ups and downs? A. No, sir.

Q. Mr. Merrill: That is all.

Mr. Davis: Yes, that's all, Mr. Bunderson.

MIKE McGUIRE

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Mike McGuire.

Q. Where do you reside?

A. Kemmerer, Wyoming.

Q. How long have you lived at Kemmerer?

A. About a month.

Q. Previous to that where did you live?

A. Montpelier.

Q. How long did you live at Montpelier?

A. At around fourteen years.

Q. What is your occupation?

A. Roadmaster, on the Union Pacific Railroad.

Q. Were you roadmaster on September 11, 1942? A. No, sir.

Q. What was your position at that time?

A. Extra gang foreman on the railroad.

Q. Were you traveling along the highway on that day? A. Yes, I was.

(Testimony of Mike McGuire.)

Q. Going where? A. To Montpelier.

Q. And from where? A. Bancroft. [183]

Q. Which direction? A. South.

Q. Do you know R. D. Hair when you see him?

A. Yes, sir.

Q. He was in the Court room yesterday?

A. Yes, sir.

Q. Did any truck pass you that day between Soda Springs and Montpelier?

A. Yes, it passed me.

Q. What kind of truck was that?

A. A little Panel truck.

Q. Did it have lettering on it?

A. Signs of tobacco on the side,—a can of Prince Albert on the side and Cigarettes on the door.

Q. Was it going the same way you were going?

A. Yes, sir.

Q. Did you later learn who was driving the truck? A. Yes, sir.

Q. Who was it driving it? A. Mr. Hair.

Q. Was there anyone,—strike that please,—did you say it passed you? A. Yes, sir.

Q. Was there anything that attracted your attention when it passed?

A. It started to honking quite a ways before it got to me [184] as it was going around and after it went around me.

Q. Rather an unusual length of time?

A. Yes, sir.

(Testimony of Mike McGuire.)

Q. Now, what was your rate of speed at the time the truck passed you?

A. Thirty or thirty-five miles an hour.

Q. At what point between Soda Springs and Montpelier was it that the truck passed you?

A. About a quarter or a half mile south of the over-pass at Soda Springs.

Q. You have driven an automobile for how long Mr. McGuire?

A. Ten or twelve years.

Q. You have had occasion to observe the speed of moving vehicles have you?

A. Well, driving along the highway I have.

Q. And on the railroad?

A. Yes, sir.

Q. How fast was the truck going at the time it passed you on the highway?

A. This panel truck?

Q. Yes, on the highway south of Soda Springs that day?

Mr. Merrill: Objected to as incompetent, calling for a conclusion of the witness and no proper foundation is laid. The testimony here is that it was 6 or 7 miles at least to where the accident happened.

The Court: He may answer. [185]

A. I would say around sixty miles an hour.

Q. Did you later see that car?

A. Yes, sir.

Q. Where was it when you saw it next?

A. Upside down in the highway, or along the highway.

(Testimony of Mike McGuire.)

Q. Do you know how long it was after it passed you that you saw it down the highway?

A. I never paid any attention to the time.

Q. Did you continue about the same speed after it passed you? A. Yes, sir.

Q. Between the time the truck passed you and the time you came upon it tipped over did you meet any other vehicle of any kind? A. No, sir.

Q. Did you meet any semi-trailer or truck?

A. No, sir.

Q. What did you observe when you came on the truck?

A. I heard a horn honk and I couldn't see anyone, and as I came up over the hump I saw this truck turned over near the highway.

Q. Was the road straight or curving at that point? A. It was straight.

Q. Did you see anyone there at the time you stopped? A. Yes, sir.

Q. Who did you see? A. Mr. Hair. [186]

Q. Did you see anyone else?

A. Not until I got to the truck.

Q. Where was Mr. Hair when you first saw him? A. He came around the truck.

Q. What did you find when you went to the truck? A. I found this woman in the truck.

Q. And what did you do?

A. I took her out of the truck and took her to Montpelier.

Q. Where did you take her in Montpelier?

A. I went to see Doctor Lindsey and told him

(Testimony of Mike McGuire.)

I had this woman and then took her up to the hospital.

Q. Did Mr. Hair make any statement with reference to the accident?

A. Not until we started to Montpelier.

Q. What did he say then?

A. That he was drinking and driving too fast.

Q. Did he say anything about a semi-trailer?

A. No, sir.

Q. Did he say anything about hitting a rock and blowing out a tire? A. No, sir.

Q. Did you pay any particular attention to the tracks on the road or to the condition of the truck when you came up to where the truck was?

A. Not to the tracks on the road.

Q. What were you interested in, Mr. McGuire?

A. In getting the people to the hospital. [187]

Q. You didn't make any examination of the tracks? A. No, sir.

Q. Did you examine the tracks back from the scene of the accident, or the tipped over truck?

A. No, sir, I didn't.

Q. Did you examine the truck that was turned over? A. No, sir.

Q. Can you tell us generally what its condition was?

A. Well, just that it was upside down and the top was caved in.

Q. Did you see any merchandise there?

A. Yes, sir.

Q. What was it?

(Testimony of Mike McGuire.)

A. Chewing tobacco, and cigarettes.

Q. Where were they?

A. Just around there on the ground.

Q. Near the truck? A. Yes, sir.

Mr. Davis: That is all, you may take the witness.

Cross Examination

By Mr. Smith:

Q. Where had you been that day?

A. I was going from Bancroft to Montpelier, I had been working.

Q. Where did this panel truck pass you with reference to the over-pass on the road?

A. I would say a half or a quarter of a mile south of the over-pass. [188]

Q. How much have you driven an automobile?

A. Quite a bit in the last ten years.

Q. Most of your work with the Union Pacific Railroad Company during that time?

A. Yes, sir.

Q. Did you ever judge the speed of automobiles as distinguished from the speed of railroad cars?

A. I have checked motor cars and trains from the highway and from the track I have checked automobiles.

Q. What was the condition of the weather that day? A. It was raining.

Q. Do you remember what time of the day it was when the panel truck passed you?

A. I can tell within ten minutes.

Q. Approximately what time was it?

(Testimony of Mike McGuire.)

A. A quarter to four, approximately.

Q. And how fast were you driving?

A. Thirty or thirty-five miles an hour.

Q. You have had automobiles pass you on the highway before? A. Yes, sir.

Q. Isn't it usual that a car speeds up when it passes another car on the highway?

A. Yes, sir, that's right.

Q. And isn't it usual that a car, in passing another car, will sound its horn? A. Yes, sir.

Q. So that there wasn't anything unusual about this car passing you and speeding up on the highway that day, was there? A. Yes, sir.

Q. There was something unusual?

A. Yes, sir.

Q. What was unusual?

A. Well, a car doesn't start honking a half a mile from you and keep on as far as you can hear it afterward.

Q. Have you had experience with your horn catching? A. Yes, sir.

Q. And your experience has been that when a horn would catch it was rather difficult to get it released for the time being? A. Yes, sir.

Q. That horn was honking when you got up to the car after it tipped over? A. Yes, sir.

Q. And you say the automobile was turned upside down? A. Yes, sir.

Q. Now you said that this car had certain signs on it. Will you relate what you said in that regard?

A. As I remember it had tobacco signs on the

(Testimony of Mike McGuire.)

side of the car. It also had the picture of a can of Prince Albert.

Q. Upon which side was the Camel sign?

A. I can't tell you. [190]

Q. And on the other there was a tobacco sign?

A. I think they were on the same side.

Q. But you cannot say for sure?

A. No, sir.

Q. Now, did you say that it had a Camel sign on one side and a Prince Albert sign on the other side? A. No, sir.

Q. What was it you meant to say?

A. It had a Prince Albert sign on the panel and a package of cigarettes on the door of the truck on the same side. I believe that is the way it was.

Q. On the same side?

A. Yes, the same side.

Q. Do you remember any lines on the road, yellow and white lines? A. No, sir.

Q. Do you remember whether the road was wavey or up and down? A. Yes, sir.

Q. It was or wasn't? A. It was.

Q. Do you remember to what extent there would be dips in the road?

A. They were at the scene of the accident.

Q. Were these quite marked, rises and falls in the road? A. Yes, sir.

Q. Do you remember that there were side roads in the vicinity where you drove that day? [191]

A. Yes, sir.

(Testimony of Mike McGuire.)

Q. Some of them were graveled roads leading out into the farming area?

A. I wouldn't know, but there were roads I know that.

Q. You do remember there were roads going to these farmers' places? A. Yes, sir.

Mr. Smith: That's all.

Redirect Examination

By Mr. Davis:

Q. You said that you could tell within ten minutes of the time the truck passed you. Had your attention been called to something so that was possible?

A. I had just looked at my watch before this.

Q. You said about four o'clock, was that in the daytime?

A. Four in the afternoon, a little after four when I drove up to the scene of the accident.

Q. You said the road was dipping up and down?

A. Yes, sir.

Q. Were you able to see cars approaching you?

A. No, sir, but I heard this horn honking.

Q. I mean cars approaching you on the road?

A. If you were just in the right place you might not be able to see them.

Q. There might be places where you couldn't see a car? A. There might be. [192]

Mr. Davis: That is all.

Mr. Merrill: That is all.

GEORGE H. NEWBY,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. George Henry Newby.

Q. You are one of the plaintiffs in this action?

A. Yes, sir.

Q. How old are you now, George?

A. Thirty-seven.

Q. What was the date of your birth?

A. January 14, 1908.

Q. You were approximately some three years younger in September, 1942?

A. Yes, I was thirty-five at the time of the accident.

Q. Do you have any children?

A. Yes, sir.

Q. How many? A. Two children.

Q. Are the children here? A. Yes, sir.

Q. What are their names?

A. Pat and Dick,—Patty Ann and Dick. [193]

Q. How old are they?

A. Eight and maybe nine,—Patty Ann is eight, I think, and Dick is eleven.

Q. Where were you born, George?

A. St. Anthony, Idaho.

Q. Where were you living on September 11, 1942?

A. My family was living at Montpelier, Idaho.

(Testimony of George H. Newby.)

Q. Who were you employed by at that time?

A. M. K. Company.

Q. Morrison-Knutson Company?

A. Yes, sir.

Q. Are you single now? A. Yes, sir.

Q. Have you ever remarried since the death of your wife? A. No, sir.

Q. What is your present occupation?

A. I am a member of the United States Navy.

Q. Where have you been immediately prior to coming to this court?

A. In the South Pacific, been there for thirteen months.

Q. When were you married?

A. I was married in Montpelier on May 18, 1930.

Q. To whom were you married?

A. Miss Avenell Tuescher.

Q. How old was Avenell on September 11, 1942?

A. She was 28. [194]

Q. Do you remember the amount of the doctor's and nurse's bill at the time of this accident?

A. I think it was \$121.00.

Q. It is alleged that it was \$115.00.

A. Well, that is what it was.

Q. And the funeral expenses, do you remember what that was?

A. A little over \$250.00, I don't remember the exact amount.

Q. What size was Mrs. Newby?

(Testimony of George H. Newby.)

A. Approximately,—at that time a hundred and five pounds.

Q. What kind of a looking girl was Mrs. Newby?

Mr. Merrill: That is objected to as being entirely immaterial.

The Court: He may answer.

A. Very good looking.

Q. What kind of a housekeeper was she?

A. A very good housekeeper.

Q. What kind of care did she take of the children?

A. The very best.

Q. What kind of care did she take of you?

A. As good as possible.

Q. And what kind of a cook was Avenell?

A. A good cook.

Q. What was your feeling toward your wife?

A. I loved my wife very dearly.

Q. Did she return that affection? [195]

Mr. Merrill: Objected to as calling for a conclusion of this witness.

The Court: I think he may answer.

A. Yes, sir, she did.

Q. What kind of care did she take of the children?

Mr. Merrill: Objected to as being repetition.

A. Very good care.

The Court: The answer is in now, and it can do no harm, it may stand.

Q. Since the death of Mrs. Newby have you

(Testimony of George H. Newby.)

been able to have the children with you and provide a home for them? A. No, sir, I haven't.

Q. Where have they been since that time?

A. With my wife's mother, Mrs. Tuescher.

Q. Is she here? A. Yes, sir.

Q. Have you paid for the care of the children since that time, George? A. Yes, sir, I have.

Q. Up to the time that you went into the armed forces how much did you pay?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. There is no showing here as to the reasonableness of any amount that might have been paid, and there is no showing that he would not have had to pay anyway. [196]

The Court: He may answer.

A. I paid seventy-five dollars a month.

Q. Since you have been in the service how much has she received?

A. I think it is sixty-two dollars a month. There are certain amounts held out but I don't remember just what it is.

Q. Have you ever seen this gentleman sitting here? A. Yes, sir.

Q. What is his name?

A. It has escaped me for the moment, but I know it.

Q. Is it Donnelly? A. Yes, Donnelly.

Q. When did you first see him?

A. Sunday morning following the accident.

Q. And where did you see him?

A. Montpelier, Idaho.

(Testimony of George H. Newby.)

Q. Where did you first see Mr. Donnelly at that time?

A. My brother-in-law and I had been down to see my wife and were returning to his home. There is a Shell station near his home and that is where we saw Mr. Hair first and then Mr. Donnelly stepped up and introduced himself.

Q. What did he say when he introduced himself?

A. He introduced himself to me as the General Manager for this district for the R. J. Reynolds Tobacco Company.

Q. Did he say anything about why he was here?

A. He was there looking after the wrecked car and to get the goods that had been taken out of it and take them [197] back to Pocatello.

Q. Now, the conversation before that occurred, what was that conversation?

A. I was talking to Mr. Hair before Mr. Donnelly came up. I was asking about the wreck; my brother-in-law was there, too, and in the course of the conversation Mr. Donnelly came up.

Q. Was that while Mr. Donnelly was there?

A. He came up while we had the conversation.

Q. What was the conversation after Mr. Donnelly came up there?

A. I was talking to Mr. Hair about this wreck and his wife was standing there and it seems that Mr. Donnelly nor his wife had any idea that there was a woman with him at that time——

Mr. Merrill: ——Now we object to that as a con-

(Testimony of George H. Newby.)

clusion of the witness and it is not responsive to the question.

The Court: Yes, that is true. I realize that it is hard to approach this matter but I would suggest that the witness confine his testimony to what was said.

Q. What did Mr. Donnelly say?

A. He heard me tell Mr. Hair about my wife and he said, "My God, you have had another woman with you this time, too." [198]

Q. Did he call your attention to the illness of your wife or the kind of Doctor you had?

A. He asked if I had a competent Doctor; he said, "Maybe we had better get a better Doctor" or something like that, and I said I thought the Doctor we had was a good, competent doctor and he asked if he might see the Doctor and talk to him and I said "Certainly, go and talk to him."

Q. Was anything said about Mr. Hair's previous trouble?

A. Yes, sir; he said he had been in several jams and he had got him out of them and he said "Now he is entirely through; this was his last chance."

Q. Did he say anything about getting excited?

A. I was quite nervous and he said not to get excited. He said there was no reason to get excited; that there was nothing really wrong about it.

Q. Did he make any statement or was anything said about what kind of a ride it was?

A. Yes, that he had talked to Hair, and he said

(Testimony of George H. Newby.)

that I had nothing to worry about; there was nothing to it but just an innocent ride.

Q. Was there anything said about what you might do or what you should not do?

A. Yes, he said: "If you have any idea of bringing suit against us, you better not. We are fully protected [199] and you wouldn't get anywhere, "and that Mr. Hair didn't have anything and a suit would do no good against him, and not to think about getting a lawyer or anything like that.

Mr. Davis: That is all, Mr. Newby.

Cross-Examination

By Mr. Merrill:

Q. Where were you living in Montpelier?

A. I had an apartment.

Q. Where was that?

A. At the Downing Apartments.

Q. What kind of an apartment was that?

A. A family apartment.

Q. How many living in that apartment?

A. I wouldn't know.

Q. How long had you been living there?

A. Twenty-eight days prior to the accident.

Q. Had you received notice to move?

A. When?

Q. At any time.

A. Yes, I received notice to move. I think it was on Sunday because I know that—No, I didn't receive it at all; it was slipped under the door.

(Testimony of George H. Newby.)

Q. It was dated before the accident?

A. Not that I know of.

Q. Did you notice the date on it? [200]

A. I read it and disposed of it in the usual manner.

Q. What did you do with it?

A. I probably put it in the waste-paper basket.

Q. Do you remember what the notice said?

A. Yes, to vacate my apartment.

Q. To vacate the apartment? A. Yes.

Q. Did it give any reason?

A. Yes, too much noise.

Q. It was written before the accident?

A. I received it after the accident.

Q. Were you there at the time of the accident?

A. No, sir; I was in Kemmerer at that time.

Q. And when you got home it was under the door?

A. No, sir, it was not under the door.

Q. When did you get back to your home?

A. Four o'clock Saturday afternoon.

Q. Were your children there?

A. No, sir, they were not.

Q. What date was that, the 12th or the 11th?

A. The 12th, I guess. What date was the accident?

Q. I think you allege the eleventh.

A. It was the Saturday following the accident.

Q. When did you get word of the accident?

A. Saturday when I got home. [201]

(Testimony of George H. Newby.)

Q. Nobody called you; you were not called and advised?

A. No, sir, I was not called.

Q. And you had not been home since when?

A. Since the Monday morning preceding the accident at about three in the morning. I left for work about three Monday morning.

Q. Where were the children when you got home?

A. At Russell Tuesher's, my brother-in-law.

Q. How long had they been there when you got home?

A. I think since Saturday morning.

Q. You know they were there since the 10th?

A. No, sir, I do not.

Q. Do you know how long your wife was away?

A. No, sir, I didn't at that time.

Q. Did you inquire later? A. Yes, sir.

Q. Did you find out that she left the evening of the 10th?

A. No, sir. My impression was that she was not out all night.

Q. But you know it now?

A. No, sir, I don't. I think she left at about nine o'clock in the morning.

Q. You don't believe that?

A. Yes, I do. I heard it.

Q. You heard it? A. Yes, sir.

Q. And you say you think she left at nine o'clock in the [202] morning?

(Testimony of George H. Newby.)

A. That is what certain people told me.

Q. By what certain people were you told?

A. Certain friends of my wife and mine.

Q. Now how long had you been living in this apartment?

A. Twenty-eight days previous to the wreck.

Q. Where did you live before that?

A. Bristol, Tennessee.

Q. How long had you been down there in Tennessee?

A. I think I went in February and returned in August.

Q. Where did you live before that?

A. Andreson Dam near Boise, Idaho. I was working for the construction company.

Q. How long did you live in St. Anthony after your birth? A. I think for four years.

Q. Where did you move then?

A. To Nyssa, Oregon.

Q. How long did you live there?

A. In 1926 I graduated from high school. I have been back several times since that time.

Q. Now, where did you say you first met Mr. Donnelly?

A. At the Shell Service station, Montpelier, Idaho.

Q. What date was that?

A. That was Sunday morning.

Q. Did he ask about your wife at that time?

A. Yes, sir.

(Testimony of George H. Newby.)

Q. He wanted to know if you had a competent doctor? A. Yes, sir.

Q. And suggested that if you didn't have, to get one?

A. That he might get one if I didn't have.

Q. And he asked if you cared if he went down to see the Doctor, did he? A. Yes, sir.

Q. You told him that was all right?

A. Yes, sir.

Q. Do you know that he went down to see the Doctor?

A. Yes, sir; I went to the hospital at the time he went to talk with the Doctor.

Q. Do you remember any other conversation?

A. Yes, sir; we had a conversation in the afternoon at the police station.

Q. Who was there at that time?

A. Several of us. Mr. Donnelly, myself, Mr. Bunderson and I think the Chief of Police and Mrs. Hair and Russell Tuescher. I think that is all.

Q. Was it at that conversation that you said that Mr. Donnelly made this statement?

A. No, sir. We were there about releasing Mr. Hair to go home to his family.

Q. You had no conversation with Mr. Donnelly at the police station except about releasing Mr. Hair to go home? [204] Where was this other conversation with Mr. Donnelly?

A. At the service station.

Q. Who was present?

(Testimony of George H. Newby.)

A. Russell Tuescher, Mrs. Hair, myself, Mr. Donnelly and Mr. Hair.

Q. What time was that?

A. That was between seven and ten in the morning.

Q. You drove up there, did you?

A. We walked up there.

Q. They were there when you arrived?

A. That is where we saw Mr. Hair.

Mr. Merrill: I think that is all.

Redirect Examination

By Mr. Davis:

Q. Mr. Newby, Counsel stated to you that you knew that your wife was out all night, that you had heard it testified to on several occasions and by different ones. Have you ever heard that testified to, that is, that your wife was out all night with Mr. Hair, have you ever heard that testified to by anybody except Hair? A. No, sir.

Q. Did anybody else ever tell you that?

A. No, sir.

Q. You did not finish your explanation as to why your investigation caused you to think that she left Montpelier [205] at nine o'clock. Was there any other explanation you wish to make?

A. It is kind of hard to have people tell you stuff like that. This friend of mine told me that my wife——

(Testimony of George H. Newby.)

Mr. Merrill: Now, we must object to any conversation with other people. It is purely hearsay.

The Court: I think he may answer in view of your cross-examination.

A. I talked with several people that thought she left at about nine o'clock in the morning. They didn't want to be subpoenaed as witnesses. They don't like to be witnesses and I think that is why they said "We heard she left at nine."

Mr. Merrill: We move to strike that as a conclusion of the witness and it is incompetent, irrelevant and immaterial.

The Court: The matter was gone into in regard to his knowledge that his wife was out every night or all night with Hair, and he testified that he didn't think she was out all night, but that she had gone out about nine in the morning. I will sustain the motion to strike the portion that is hearsay.

Mr. Davis: I don't think that portion where he explains his reason is hearsay.

The Court: The portion which is hearsay may be stricken. [206]

Q. You were asked if you made any investigation to find out where your wife was and when she left Montpelier?

A. Yes, I was asked if I made any inquiry.

Q. From the investigation or inquiries you made, what did you find out and what is now your opinion as to where your wife was and when she left that day?

Mr. Merrill: Objected to as calling for a con-

(Testimony of George H. Newby.)

clusion and is a matter which the jury must pass upon.

The Court: He may answer.

A. What I think to be true is that she left at about nine o'clock in the morning of the accident.

Mr. Davis: That is all.

Mr. Merrill: That's all.

MRS. ROSETTA TUESCHER,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Rosetta Tuescher.

Q. Where do you live? A. Geneva.

Q. Are you married? A. Yes, sir. [207]

Q. Did you have any children?

A. Yes, sir.

Q. How many children did you have?

A. I had eight children.

Q. Did you have a daughter, Avenell?

A. Yes, sir.

Q. Was she the wife of Mr. Newby, who was just on the stand here? A. Yes, she was.

Q. How old was Avenell at the time she died in September, 1942?

(Testimony of Mrs. Rosetta Tuescher.)

A. She was twenty-eight years old in August, the 9th of August of that year.

Q. How many children did Avenell have?

A. Two.

Q. Are these the children that are here in the Court room? A. Yes, sir.

Q. Do you take care of them, Mrs. Tuescher?

A. Yes, I take care of them.

Q. How long have you been taking care of them?

A. Ever since their Mamma died.

Q. Do you get paid for caring for them?

A. Yes, sir.

Q. Who pays you?

A. Before George went into the Navy he paid me.

Q. What amount did he pay you before he went into the Navy?

A. Seventy-five dollars a month for everything.

Q. Did you have occasion to visit Avenell's home at different times after her marriage?

A. Yes, sir.

Q. What kind of a housekeeper was Avenell?

A. A mother always thinks her girl is fine, but she kept a clean house; yes, she was a good housekeeper.

Q. What kind of care did she take of the children?

A. Very good care of the children.

Q. What was their demeanor when they came to you?

(Testimony of Mrs. Rosetta Tuescher.)

A. They were just like little children of that age. Every Mother knows what little children are.

Q. Do you know what this exhibit is, Mrs. Tuescher? A. Yes, sir.

Q. And who is that a picture of?

A. That is a picture of my little girl.

Q. Is that a good likeness of her? A. Yes.

Q. At the time she passed away?

A. This was taken a year or two before, but this is just like Avenell.

Q. Did she look like that?

A. Very much,—she was a pretty girl.

Q. Mr. Davis: We have had this marked as plaintiff's exhibit 9, and we now offer it in evidence.

Mr. Merrill: We object to this exhibit; it is [209] immaterial; no proper foundation has been laid; it has not been properly identified as a true likeness, it is testified that it was taken at a different time, some two years before the accident. The most that this witness could say was that it was a pretty good likeness, or pretty much of a likeness. It is also designed and intended to prejudice the jury, and as I said no proper foundation has been laid for the admission of the exhibit.

The Court: Objection overruled. It may be admitted.

Mr. Davis: That is all, thank you, Mrs. Tuescher.

Mr. Merrill: No cross-examination.

RUSSELL TUESCHER,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Russell Tuescher.

Q. Where you yo ulive?

A. Montpelier, Idaho.

Q. How long have you lived there?

A. All my life. [210]

Q. What is your occupation?

A. Conductor on the Union Pacific.

Q. What is your age? A. Thirty-three.

Q. Avenell Newby was your sister?

A. Yes, sir.

Q. I call your attention to this gentleman sitting here. Have you ever seen him before?

A. Yes, sir, I have.

Q. And did you ever see Mr. Hair who was in the Court Room yesterday? A. Yes, sir.

Q. You know the man I refer to?

A. Yes, I know.

Q. When did you see these two gentlemen?

A. The first time is the time that J. was at the hospital visiting my sister.

Q. Where was that?

A. I just came out of the hospital and I asked my brother Calvin "What does this man Hair look

(Testimony of Russell Tuescher.)

like?" and he said there he is now and I walked across and said "Avenell is dying and we don't like this"—

Mr. Merrill: We object to this. It is not responsive and it is a conversation with——

Mr. Davis: I consent that it be stricken.

The Court: It may go out. [211]

Q. Russell, I am asking in reference to Mr. Donnelly and Hair. Did you later see Mr. Donnelly?

A. The first I saw these two men was in front of the Blue Light Service station I stopped them and asked them where they were going.

Q. Just a minute,—did you have a conversation with Hair when Donnelly was there?

A. I did.

Q. What was that conversation?

A. I said "you are the tobacco salesman" and then I said "my sister was with you last night" and I said "where are you going" and he said "I am leaving town" and I said "my sister is very ill" and I said "you are not leaving town until we know the outcome of this."

Q. Did Mr. Donnelly say anything at that time?

A. Mr. Donnelly recognized the fact that Mr. Hair was very excited——

Q. Never mind that Russell,—just what Mr. Donnelly said.

A. He came up and said "What is the trouble?" and I told him and he said "Good God, Hair, did you have a woman in the car with you again"?

(Testimony of Russell Tuescher.)

Q. What did Hair say?

A. He said "yes"—he said "I thought everything would be all right and I would not have to let you know."

Q. Did Mr. Donnelly say anything else? [212]

A. He asked what kind of medical care she was getting and I said "we have the best doctor in Montpelier" and he said "Is there anything else that we can do for her" and I said "the best way to find out is to consult the doctor".

Q. Did you go to the hospital?

A. Yes, sir.

Q. Did Mr. Donnelly say anything further to you?

A. Yes, Mr. Donnelly said that he had had trouble several times with Hair that he caused him a lot of trouble and grief and that was the last straw, that he was through with him.

Q. Did he say anything about your occupation?

A. Yes, he said he was through with him, and he said if I needed a job that he would give me one.

Q. What did you tell him?

A. That I had a good job with the Union Pacific.

Q. Was there any conversation with reference to George Newby, with Mr. Donnelly?

A. Yes, sir, there was in a way.

Q. What did he say?

A. He said "Russell, you look like a level headed fellow and I wish you would tell him",—he said "we are such a big corporation and have so

(Testimony of Russell Tuescher.)

much to protect" he said; "all he could do would be to spend a few of his hard earned dollars and end up with nothing at all". [213]

Q. Did he say anything about George getting a lawyer? A. Yes, sir.

Q. What did he say?

A. He said "there may be some shyster lawyer with the thought in mind that he had a case against us and you better talk him out of it because there would not be a possible chance."

Q. Did Mr. Donnelly make any statement as to why this man was through with the Company?

A. Only because he had such trouble with him previously.

The Court: I think we will recess at this time until 1:30.

1:30 P. M. March 20, 1945.

Mr. Davis: That is all the direct examination.

Cross Examination

By Mr. Merrill.

Q. What was your occupation in September, 1942? A. Brakeman.

Q. Out of Montpelier? A. Yes, sir.

Q. Where do you, or where did you live in Montpelier?

A. I had a home between the Blue Light Service Station and Fourth.

Q. How far from the Downing apartments?

(Testimony of Russell Tuescher.)

A. About two blocks.

Q. Were these children at your place when Mr. Newby came home on Saturday? A. Yes, sir.

Q. Are you at home each night?

A. No, sir.

Q. Were you home on the nights of the 10th and 11th of September? A. No, sir.

Q. I mean in 1942? A. No, I wasn't.

Q. When did you get home?

A. I don't know exactly what date I came in but it was around two,—two A. M. Saturday.

Q. What day was your sister injured on?

A. Friday.

Q. You came home what day?

A. Saturday.

Q. In the morning? A. Yes, sir.

Q. The children were at your home when you got there? A. No, sir.

Q. And they had been for some time?

A. No, sir.

Q. Didn't you ask your wife——

Mr. Davis: We object to anything that he [215] may have asked his wife——

Mr. Merrill: I will withdraw the question.

Q. You knew that they were there?

A. On this day, I did, yes.

Q. You had a conversation with Mr. Donnelly?

A. Yes, sir, I did.

Q. When was the first conversation with Mr. Donnelly, if you had more than one?

(Testimony of Russell Tuescher.)

A. At the Blue Light Service Station.

Q. When was that? A. Sunday.

Q. Who was there?

A. Mr. Donnelly; my brother; George Newby; my father; Mrs. Hair; Mr. Hair and two other ladies that I didn't know.

Q. What was said?

A. I said "you are not leaving town until we know the effects on my sister, she is dying and we don't like it".

Q. Is that the time you said "my sister was with you last night?"

A. I asked Mr. Hair that.

Q. What was the exact words you said to Mr. Hair? A. I couldn't say them exactly.

Q. What did you say on direct examination?

A. Well, I knew that my sister was with him because my friends had——

Mr. Merrill: Just a minute, I move to strike [216] the answer except that he knew his sister was with him,—I move to strike the answer, it is not responsive?

The Court: I will strike it, yes.

Q. You had information that your sister had been out with Hair that night?

A. No, I didn't.

Q. What did you mean when,—strike that, please,—you had information that she had been with Hair. A. Yes, I did.

Q. What did you mean when you testified that

(Testimony of Russell Tuescher.)

you said my sister was with you last night, to which Mr. Hair said "yes." A. What did I mean?

Q. Yes, what did you mean by that.

A. I meant that it was ungentlemanly to run off and leave her after he had killed her.

Mr. Merrill: I move to strike that as not responsive. It seems to me that the words themselves denote the meaning.

Q. Mr. Tuescher, did you, in that conversation with Mr. Hair say in substance and effect "my sister was out with you last night"?

A. I did not.

Mr. Davis: It seems to me that this has been asked and answered.

Q. To whom did you say that? [217]

A. I don't think I said those words to anyone.

Q. What did you say? A. I don't recall.

Q. Give us just what you do recall.

A. I was seeking information as to whether he was with her or not.

Q. What did you say?

A. I wouldn't know.

Q. Tell us as near as you can?

A. It would probably be jumbled up.

Q. In answer to a question by Mr. Davis you said "my sister was with you last night and Hair said yes" is that a fact? Did you say that, and did Hair say yes?

A. At the moment I might have said that.

Q. Did you say that? What is the truth about it? A. I could.

(Testimony of Russell Tuescher.)

Q. Did you say those words?

A. I did say those words.

Q. Now, what night did you have reference to?

A. I don't know.

Q. When you made that comment, what night did you have reference to? A. I don't know.

Q. You didn't mean Saturday night?

A. I didn't know what night they were together. [218]

Q. When you made that remark what night did you refer to, Saturday night or any preceding night?

A. The night I referred to was Saturday night, I didn't know anything about any other night.

Q. You knew she was in the hospital Saturday morning.

A. I knew she was in the hospital.

Q. You knew she had been injured Friday afternoon? A. I did.

Q. And you didn't mean Saturday night then, did you? A. I did.

Q. Why did you ask if he was with her?

A. At times you may make a mistake.

Q. Answer my question.

A. I asked the gentleman, "were you with my sister last night".

Q. And you meant the night of the injury?

A. I did not.

Q. You had been informed that he was with her the night of the injury? A. I had.

(Testimony of Russell Tuescher.)

Q. And that was the night you had reference to when you asked Hair that question?

A. No, sir, it wasn't.

Q. Then why did you ask about the night she was in the hospital?

A. That is what I asked him. [219]

Q. You knew that you wasn't with her in the hospital? A. Is that so.

Q. Well, didn't you?

A. I knew he was there.

Q. When you said "were you with my sister last night" you meant the night preceding the accident? A. I did not.

Q. Why did you make that comment?

A. Because it looked very cheap to run off without visiting her before he left. I knew he was in the hospital Saturday night.

Q. Why did you say "my sister was with you last night," those are your exact words.

Mr. Davis: I submit, if the Court please, that the witness has attempted to explain this and if the explanation of the witness is not satisfactory to counsel he cannot keep after the witness in this manner.

The Court: The explanation made does not seem to be satisfactory to counsel. I will let him answer once more.

A. I was informed that this man was leaving town and I wanted to find out for my personal satisfaction. I wanted to find out the true facts Saturday night before he left. [220]

(Testimony of Russell Tuescher.)

Q. You had been informed that he was with her the night of the injury.

A. That has nothing to do with it.

Q. You had been informed that your sister had been with this man the night preceding the accident.

A. I had been,—Friday night.

Q. The night preceding the accident.

A. I did, yes.

Q. The accident was Friday night or Friday afternoon, so that would be Thursday night.

A. Yes.

Q. The children were at your home when you came home?

A. Yes, sir.

Q. They had been there before you got home for some time?

A. I don't know.

Q. Mr. Newby was present when you said to Hair, "my sister was with you last night" and you said that Hair said "yes".

A. He was not.

Q. Wasn't Mr. Newby present at that conversation.

A. He was not.

Q. You testified that Mr. Newby and your brother and some others were there?

A. I sent my brother Calvin after my brother-in-law George Newby.

Q. When you made this comment to Hair, who was present?

A. The two of us, myself and brother Calvin and I later [221] sent for these other men.

Q. Mr. Donnelly was there?

A. Yes, sir.

Q. And Mr. Hair.

A. Yes, sir.

(Testimony of Russell Tuescher.)

Q. Who else? A. Brother Calvin.

Q. The four of you. A. That's right.

Q. You say that Donnelly spoke up and said "Good God, Hair, did you have a woman in the car with you again?" A. That's right.

Q. Was that before or just following the statement to Hair "my sister was with you last night."

A. No, sir, it wasn't.

Q. When was that comment made?

A. That was in the presence of these men I mentioned.

Q. I beg your pardon.

A. In the presence of all these men.

Q. When was the comment made that you say was made "Good God, Hair, did you have a woman in the car with you again"? When was that comment made, and who was present?

A. My father, my brother, Mr. Donnelly, Mr. Hair and myself.

Q. Was Mr. Newby there? A. Yes, sir.

Q. How long after you made the first statement to Hair was that comment made?

A. My brother had just left the platform of the station and come back because my father and George were practically at the station at that time and so he turned around and made the statement.

Q. Have you stated all the conversation that occurred at that time in answer to Mr. Davis' question? A. All that I can, yes I think so.

Q. Mr. Donnelly said that Hair was through.

A. That he was washed up.

(Testimony of Russell Tuescher.)

Q. Did Mr. Donnelly say at that time that he was fired? A. In my words he did, yes.

Q. You say that he offered you a job.

A. Yes, sir.

Q. What was the language that he used.

A. Mr. Donnelly and I were sitting in the car when Don Stevens came to work and I said "coming to work or going" and Mr. Donnelly said to me, "Russell have you got a job" and I said "yes" and he said, "if you didn't have I was going to give you one".

Q. Donnelly said "if you didn't have a job I was going to offer you one".

A. He did offer me one.

Q. I want his words. [223]

A. He did offer me a job.

Mr. Merrill: The witness is not answering my question.

The Court: You may ask the question again, and just answer the question, Mr. Witness.

Q. What did Mr. Donnelly say to you and what did you say to him? A. He offered me a job.

Q. What words did he use?

A. I don't know.

Q. You made the statement as to what he said?

A. I don't know.

Q. You have forgotten it. A. Yes, sir.

Q. Since you related it on the witness stand here? A. I surely have.

Q. You remember some of the other matters three or four years ago?

(Testimony of Russell Tuescher.)

Mr. Davis: That is argumentative.

Mr. Merrill: Yes, it is, I withdraw it. That is all.

Mr. Davis: That is all. Now, if the Court please, at this time I want to offer the testimony of Calvin Tuescher as given at the former trial. I have made inquiry, and if my statement as to why he is not here is [224] sufficient otherwise I will be obliged to make a showing by calling the United States Marshal. I know the facts connected with this matter.

The Court: What does counsel for defendants have to say about this.

Mr. Davis: If the Court please, counsel has kindly agreed that my statement of this matter may be taken as correct without proving it with sworn testimony, but counsel has not admitted that I may use the testimony. With reference to Calvin Tuescher he was a witness here at the former trial and was cross examined by Counsel for the Reynolds Tobacco Company. Mr. Tuescher has been in India in the United States armed forces for some fourteen months and when I learned that there was to be a new trial I immediately tried to take his deposition. I gave a subpoena to the United States Marshal and of course, he could not serve him I tried to take his deposition and was not able to do this and I ask now to read the testimony of this witness at the former trial.

Mr. Merrill: We take Mr. Davis' statement to

be the facts, but we object to the use of this testimony on the ground that it is incompetent, irrelevant and immaterial. The parties are different from the parties who were in the trial before——

The Court: My recollection is that the rules of Civil Procedure provide for the use of this testimony. The objection will be overruled.

Mr. Davis: The testimony that I seek to read from shows the certificate of G. C. Vaughan as the official Court reporter who took the testimony and the certificate is dated the 9th day of March 1944. I am going to read from the testimony given at the former trial at page 173 of the original transcript.

“CALVIN TUESCHER,

being called as a witness on the part of the plaintiffs after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. State your name?

A. Calvin Tuescher.

Q. Have you ever been a witness before?

A. No, sir.

Q. How old are you Calvin?

A. Twenty.

Q. Where do you live? A. Geneva, Idaho.

Q. You are a brother of Avenell Newby?

(Testimony of Calvin Teuscher.)

A. Yes, sir.

Q. Calling your attention to this gentleman here, the third [226] from the end (indicating), have you ever see him before? A. Yes, sir.

Q. And the other gentleman next to him, this way? A. Yes, sir.

Q. Where did you meet them?

A. Montpelier.

Q. Where were you in Montpelier when you met them?

A. With my brother Russell in front of the Burgoyne Service Station.

Q. Did you hear any conversation at that time?

A. Yes, sir.

Q. Did Russell say anything to Mr. Hair when they met there? A. Yes, sir, he did.

Q. What did he say?"

"Mr. Merrill: Objected to as no foundation is laid, when it was or the place."

Mr. Davis: There was no ruling on that and no answer.

"Q. You heard your brother Russell testify?

A. Yes, sir.

Q. How long was it after the accident in which Avenell was hurt was it that you had this conversation, or was the conversation had?

A. Shortly after.

Q. In what town? A. Montpelier. [227]

Q. At what place?

A. Roy Burgoyne Service Station.

Q. Who was there?

(Testimony of Calvin Teuscher.)

A. Mr. Hair, my brother and myself, in which this gentleman said he was going to leave town.

Q. Did Mr. Donnelly come up when you were talking, or when they were talking?

A. That's right.

Q. What did your brother say?

A. He asked him where he was going and he said that he was going home, and my brother said in case you are interested that is my sister that is in the hospital dying now, and you are not going.

Q. Did Mr. Donnelly say anything?

A. Yes, sir.

Q. What did he say?

A. He said "for God's sakes were you with another woman".

Q. Was anything said there with reference to the Doctor? A. That's right.

Q. By Mr. Donnelly? A. Yes, sir.

Q. What did he say?

A. He questioned the efficiency of the Doctor because it was such a small place.

Q. Did you go any place then?

A. Yes, to the hospital. [228]

Q. How did you go?

A. I drove George Newby's car.

Q. Who went with you?

A. My brother and Mr. Donnelly.

Q. Did you hear your brother and Mr. Donnelly have any further conversation?

A. They did.

Q. What did Mr. Donnelly say?

(Testimony of Calvin Teuscher.)

Mr. Merrill: Objected to as no time or place is fixed.

Mr. Davis: I will fix the time and place Mr. Merrill.

Q. In the automobile when you were driving to the hospital did they have a conversation?

A. Yes, sir.

Q. Mr. Donnelly was in the car was he?

A. Yes, sir.

Q. You were in the car?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. Yes, sir.

Q. Now, what did he say?

A. He said that Russell was a very level headed fellow"—

Mr. Davis: Strike that.

“A. He said that Russell was very level headed, the coolest one in the bunch and he offered him a position. He said [229] he couldn't trust Hair any more.

Q. Was there anything said about warning him before?

A. Yes, sir, he said he couldn't trust him any more.

Mr. Davis: That is all, you may examine.”

Shall I read the cross examination?

Mr. Merrill: Yes, go ahead.

(Testimony of Calvin Teuscher.)

“Cross Examination

By Mr. Merrill:

Q. Isn't it a fact that what Mr. Donnelly said to your brother about a position was that he asked if he had a position, or was working. Isn't that what he said?

A. He offered him a position.

Q. Isn't it a fact that he asked your brother if he had a position or was working?

A. Well, I don't remember the exact words.

Q. Would you say that was not what was said?

A. No.

Q. Don't you recall that what was said about a position, Mr. Donnelly asked your brother if he had a position or was working?

A. I don't remember just the words.”

Mr. Davis: That is all the testimony of Calvin Teuscher, and at this point in the proceedings of the former trial I read from 41 Corpus Juris and I ask permission to read from it again at this time. [230] Mr. Merrill has consented that if the same ruling is made as formerly made that I don't have to have the volume here, but may read from the record here.

Mr. Merrill: We object to the introduction of this as being incompetent, irrelevant and immaterial for any purpose whatsoever.

The Court: Overruled. You may read it.

Mr. Davis: “The table shows, at page 216 of volume 41 Corpus Juris that the life expectancy of one 28 years of age to be 36.73 years.”

L. R. DONNELLY,

called by the plaintiff for cross examination under the rules, testifies as follows:

Cross Examination

By Mr. Davis:

Q. State your name?

A. L. R. Donnelly.

Q. Where do you live?

A. Salt Lake City, Utah.

Q. Who do you work for?

A. R. J. Reynolds Tobacco Company.

Q. How long have you worked for them?

A. Now, approximately fifteen years.

Q. Were you employed by them at all times when Rulon D. Hair was a salesman for that Company?

Mr. Merrill: Now, we object to any further proceedings by cross examination under the statute upon the ground that it doesn't appear that this testimony is peculiarly within the knowledge of this witness. If they want to call him as their own witness that is another matter, but for cross examination and to interrogate him about matters that can be shown by various other witnesses, I do not think that should be permitted.

The Court: Under the rules of civil procedure he has a right to call him.

Mr. Merrill: I know of none that give him the right to call him for cross examination and then examine him on such matters.

The Court: Overruled. I am sure the rules so provide.

Mr. Merrill: Exception please.

(Testimony of L. R. Donnelly.)

A. I was.

Q. How long was Mr. Hair a salesman for the Company?

A. Well, if I recall right he started to work in 1937.

Q. Do you know what his age was at that time?

A. No, sir.

Q. Mr. Hair was working for the Reynolds Tobacco Company at all times from the time he started to work until September 3, 1942?

A. He was employed, yes sir. [232]

Q. Do you know Mr. Hair's signature?

A. I believe I do.

Q. Handing you what has been marked as Plaintiff's exhibit 10 I will ask you, do you know whose written signature is on that?

A. No, I don't know.

Q. Do you know the writing of the person that signed the application for the license?

A. I don't know who signed it. You mean the R. D. Hair?

Q. Is that Hair's writing?

A. I wouldn't swear to it.

Q. What do you think?

A. I wouldn't know.

Q. You saw his hand writing many times?

A. That's right.

Q. He made many reports to you?

A. Yes, sir.

Q. But you don't know whether that is his hand writing or not, Mr. Donnelly?

A. No, sir.

(Testimony of L. R. Donnelly.)

Q. Do you know whose hand writing these words are: "L. R. Donnelly by R. D. Hair"?

A. I wouldn't say for sure, but it appears like Hair's writing.

Q. Is it or isn't it Hair's writing?

A. I wouldn't say for sure. [233]

Q. Now, exhibit 12 marked for identification, can you tell whose hand writing that is?

A. I cannot tell whose writing it is, but it is the signature of Hair.

Q. I ask you to look at this exhibit marked 13 for identification. I am referring now, Mr. Donnelly, to the name Donnelly by Hair. Do you know whose hand writing it is?

A. It looks like Hair's hand writing.

Q. Do you say it is or not?

A. I wouldn't say it is.

Q. Did Mr. Hair have authority to sign your name?

A. I believe I gave him authority on that occasion.

Q. What was that occasion?

A. Because it wasn't possible for me to get his license plates for the car and I gave him authority to get the license plates.

Q. Gave him authority to sign for the license in your name?

A. Yes, at one time I did.

Q. What was that time?

A. To get the license plates.

Q. Yes, what time was that?

(Testimony of L. R. Donnelly.)

A. It says 1942 here.

Q. Did you ever give him authority more than once? A. It is possible that I did.

Q. Did he have authority in 1938, 1939, 1940, 1941 and 1942 [234] to go to the County Assessor and get the license and sign for you in getting the license for the truck to use in selling the products of the Reynolds Tobacco Company?

A. It has been a long time ago, but if he did I guess I gave him the authority.

Q. Did you give him the authority to do that?

A. I must have.

Q. You must have?

A. Yes, sir, I must have.

Mr. Davis: That is all at this time.

Mr. Merrill: No questions.

RULON D. HAIR,

called by the plaintiffs for cross examination under the rules, after being first duly sworn, testifies as follows:

Cross Examination

By Mr. Davis:

Q. Will you state your name?

Mr. Davis: I am calling this witness for cross examination as the party who was the agent of the company at the time I am seeking to examine him about now.

(Testimony of Rulon D. Hair.)

Mr. Merrill: We object to this procedure. There is no rule on that matter. He is not a party to this action. [235]

The Court: Of course, you can call him as your witness: I think perhaps you better get that rule for me before a final ruling is made on this matter.

Mr. Davis: Yes, I want to get that rule later but I can proceed now with him called as my own witness.

Direct Examination

By Mr. Davis:

Q. Your name is Rulon D. Hair?

A. Yes, sir.

Q. I call your attention to the signature, R. D. Hair. Whose writing is that? A. Mine.

Q. That is your writing? A. Yes, sir.

Q. Who were you working for when you wrote that? A. The Reynolds Tobacco Company.

Q. Who was the Division Manager under whose supervision you worked at that time?

A. L. R. Donnelly.

Q. Is he the gentleman who was just on the stand? A. Yes, sir.

Q. Did you have authority to sign that application as L. R. Donnelly, by yourself?

A. I didn't sign this L. R. Donnelly. [236]

Q. I will ask you if you had authority to sign your name and secure a license in your name for L. R. Donnelly? A. I must have.

Q. You secured the license did you not?

(Testimony of Rulon D. Hair.)

A. Yes, sir, on this particular one it seems that I had a little difficulty until I got his permission.

Q. You got the license? A. Yes, sir.

Q. And you put it on the Reynolds Tobacco Company truck did you not? A. Yes, sir.

Q. You used it and it was registered in the name of L. R. Donnelly? A. Yes, sir.

Mr. Davis: These four exhibits were used before. They were marked for identification and later marked admitted. They are original records and I was permitted to insert copies. If they are admitted I ask permission to follow the same procedure and to substitute copies.

Mr. Merrill: We have no objection to that procedure.

The Court: Very well, you may do so.

Mr. Davis: We now offer exhibit number 10, plaintiffs' exhibit 10.

Mr. Merrill: No objection. [237]

The Court: Admitted.

Q. Now, you have been presented with exhibit marked for identification as plaintiffs' exhibit 11, I call your attention to the handwriting on that application and ask you whose it is?

A. It is mine. —

Q. How did you sign that?

A. L. R. Donnelly by R. D. Hair.

Q. Did you have authority to do that?

A. I evidently did.

Q. Did Mr. Donnelly give you authority to secure the license in that way?

(Testimony of Rulon D. Hair.)

A. He must have.

Q. You used the licenses you secured in that way on the truck that was registered in Mr. Donnelly's name and which was delivered to you by the Reynolds Tobacco Company?

A. Yes, sir.

Q. And you used it in going over your territory?

A. Yes, sir.

Mr. Davis: We offer Exhibit 11 as evidence at this time.

Mr. Merrill: No objection.

The Court: Admitted.

Q. Now I call your attention to Plaintiffs' Exhibit 12 marked for identification and ask you who signed the [238] application for license that year?

A. I did.

Q. Did you sign Mr. Donnelly's name at that time?

A. No, sir.

Q. Did you procure that license?

A. I cannot tell. There was one that I had some difficulty with and I don't know which it was.

Q. Did you have a license that year?

A. Yes, sir, I had one every year.

Q. And you used it on the car?

A. Yes, sir.

Q. Did you have authority to sign that year for Mr. Donnelly?

A. I must have had.

Mr. Davis: We offer in evidence at this time Plaintiff's Exhibit 12.

Mr. Merrill: No objection.

The Court: Admitted.

(Testimony of Rulon D. Hair.)

Q. Exhibit 13 has been handed to you. Who signed that application? A. I did.

Q. How is it signed?

A. Lewis R. Donnelly by R. D. Hair.

Q. You had authority to sign his name on that?

A. Yes, sir.

Q. That is the application for license?

A. Yes, sir. [239]

Q. You secured a license on that application?

A. Yes, sir.

Q. And placed it on the truck?

A. Yes, sir.

Q. And secured the license in the name of Mr. Donnelly? A. Yes, sir.

Q. With Mr. Donnelly's consent and authority?

A. Evidently.

Q. And you used it on the truck?

A. Yes, sir.

Mr. Davis: Now I offer Exhibit 13 in evidence.

Mr. Merrill: No objection.

The Court: Admitted.

Mr. Davis: I would like to have the Bailiff hand me the deposition of E. A. Darr. Would Your Honor like to have a copy to follow the reading? I have an extra copy. I want to read from the Cross-Examination of Mr. Darr.

Mr. Merrill: I object to this at this time upon the ground that it is immature and upon the further ground that cross-examination of a witness whose direct examination is not before the jury is confus-

(Testimony of Rulon D. Hair.)

ing and is improper in the presentation of the matter to the jury, particularly when the originla [240] testimony has not been produced.

The Court: The objection will be overruled. You may proceed with the reading.

E. A. DARR.

Cross examination in deposition of E. A. Darr was read by Mr. Davis.

“Cross Examination

“Q. Mr. Darr, I believe you stated that Mr. Rulon D. Hair was employed by the Company some time in 1937? A. July 10, 1937.

Q. Has Mr. Hair been in the continuous employment of the R. J. Reynolds Tobacco Company since that date, up until the time of this accident about which this suit is involved? A. He had.

Q. This panel truck you spoke of, involved in the accident in the case at bar, was delivered to him some some time in 1942?

A. On February 8, 1942.

Q. Was that a new Chevrolet panel truck at that time?

A. I am not certain, but I am inclined to think it was, since that agreement would have to be signed by a salesman each time a new car or a car is delivered to him.

Q. Or a change of the car?

A. Or a change of the car. He had previously

(Deposition of E. A. Darr.)

signed a similar agreement in February, 1938, which was the first [241] time he had been given a car.

Q. What kind of a car was that you delivered to him at that time—a Chevrolet?

A. I am unable to say. My records don't show.

Q. Well, the car you delivered to him in 1938, the first car, was that the only car that was delivered by the R. J. Reynolds Tobacco Company to Mr. Hair up until this car in February, 1942?

A. That is correct.

Q. In other words, he has had in his possession two cars of the R. J. Reynolds Tobacco Company during his employment?

A. That is right. I think I must qualify that answer. Without examining our records, I would be unable to say whether there were just two cars or whether there had been a series of cars that had been delivered to him between February, 1938, and February, 1942.

Mr. Merrill: We object to the next question if the Court please, our thought is that the Court should consider this at this time before it is given to the jury in any way. We object to it as it is wholly immaterial and improper under the present set-up of this case.

The Court: You may read the question down to and including the word "accident" and then read "in April, 1939, is that right?" [242]

Mr. Davis: If I make the proper showing, then I presume that I may re-ask the question?

(Deposition of E. A. Darr.)

The Court: Yes, if the proper showing is made, I will permit it.

Mr. Davis: So that I may do this in accordance with the ruling of the Court, may I approach the bench and go over this?

The Court: Yes, counsel may approach the bench.

“Q. The first car that the R. J. Reynolds Tobacco Company delivered to Mr. Hair was the car in which he was involved in the accident in April, 1939; is that right?

Mr. Merrill: Now, we object to that as incompetent, irrelevant and immaterial and not proper cross examination and is not in anywise justified by any of the pleadings of this case.

The Court: He may answer.

“A. I would have to check the records to see if it was the identical car.

Q. But it was a car of the R. J. Reynolds Tobacco Company? A. It was.

Q. Whatever car he might have been using at that time? A. That is right.

Q. And the car that you delivered to him in February, 1942, of the R. J. Reynolds Tobacco Company is the car that is [243] involved in the injury of the plaintiffs' intestate in this particular accident?

A. That was my understanding.

Q. Have you ever seen Rulon D. Hair yourself?

A. No, not to my recollection.

Q. Under whom does he work in that territory?

(Deposition of E. A. Darr.)

A. His division manager is L. R. Donnelly.

Q. Has Mr. L. R. Donnelly been division manager in that territory all the while since Rulon D. Hair became employed by the R. J. Reynolds Tobacco Company? A. He has.

Q. Does Mr. Hair make his reports to the division manager, Mr. Donnelly, or does he make them direct to the company? A. Both.

Q. He delivers you a copy, or Mr. Donnelly a copy of the reports that he sends in from his work and business; is that right?

Mr. Merrill: We object to that as not proper cross examination, it is incompetent, irrelevant and immaterial and no proper foundation is laid.

The Court: He may answer.

“A. That is right.

Q. So Mr. Rulon D. Hair then works and operates under Mr. L. R. Donnelly as division manager of that particular territory?

A. That is right, plus his direct connection with this office. [244]

Q. But Mr. Donnelly, the division manager, is his direct superior officer in the operation of the business for the R. J. Reynolds Tobacco Company; is that right? A. That is right.

Mr. Merrill: We object to the next question upon the same grounds as heretofore urged, that it is incompetent, irrelevant and immaterial and it is not proper cross examination, and that it is contrary to the ruling heretofore made.

The Court: I think at this time I will hear you

(Deposition of E. A. Darr.)

on this matter, I think perhaps the entire question is admissible but I will hear you on it now. I will excuse the jury and ask them to remain within call of the Bailiff.

(The following proceedings had in the absence of the jury.)

The Court: The matter that the Court was a little in doubt about was the matter of the accident that Mr. Hair had in April, 1939. The Ninth Circuit Court of Appeals in commenting on the evidence in this case, in their opinion, at the top of page 770, of 145 Fed. 2nd, they say: "At an earlier time he had an accident while returning from a visit to a night club in a company truck. On that occasion he had a male guest with him. The accident resulted in the killing of a pedestrian and in Hair's arrest on a criminal charge. The employer was fully advised of the facts of that incident, but Hair's known violation of the rule did not eventuate in his dismissal. His services were retained at Donnelly's suggestion, apparently because he was thought to be a good salesman." I take it that under the decision rendered in this case that the main objection to that testimony was on the instruction given by the Court that they could take that incident standing alone as evidence to prove that he was a reckless driver, but that it was admissible in support of the knowledge on the part of the Reynolds Tobacco Company and Mr. Donnelly that the rule as to hauling guests had been violated. I also take it that the position of

(Deposition of E. A. Darr.)

Mr. Merrill and Mr. Smith is that the evidence is not admissible at all.

Mr. Merrill: That is true, and knowing as Court and counsel knows now that there was only one incident here, it would be wrong to permit it to go to the jury and then correcting, or attempting to correct it by instruction to the jury.

The Court: Unless the evidence was different in this case, the matter of reckless driving could not be submitted to the jury, but this testimony has been used and mentioned by the Circuit Court of Appeals on the question of knowledge to the Company as a waiver of the rule on hauling guests. [246]

Mr. Davis: The only evidence which the Circuit Court held was improperly admitted was the certified copy from Clark County. That is the only ruling that the evidence was improperly admitted in this case. That was on the evidence at that time but if there was more evidence, then you would have to pass upon that now.

Mr. Merrill: Now, if I may read a portion of the decision of the Circuit Court of Appeals.

The Court: Yes.

Mr. Merrill: At page 769 the Court says: "We have concluded that the judgment must be reversed because of error in the reception of proof concerning Hair's previous record as a driver and because of the submission of that issue to the jury."

The Court: That is right, on that one issue.

Mr. Merrill: That has to do with the Myers' incident.

(Deposition of E. A. Darr.)

The Court: No, that is a question of having a guest with him. He had a guest with him at the time Myers was killed. The way I interpret this decision of the Circuit Court is that they don't hold that the admission of that testimony was error because they used that testimony in support of their decision on [247] the other question.

Mr. Davis: On the question of waiver of the instruction to Hair.

The Court: Yes. I understand, Mr. Davis, that you will want to connect this up with further testimony.

Mr. Davis: Certainly. I am in good faith; I expect to show by evidence that I will elicit from the defendants themselves that Mr. Donnelly did know that Mr. Eckersley was in the car.

The Court: Well, we will proceed now, you may ask the question.

Q. You did know, Mr. Darr, that Rulon D. Hair was involved in an accident with the R. J. Reynolds Tobacco Company truck on or about April 11, 1939, in which a man named Myers was killed?

Mr. Merrill: To which we object as being incompetent, irrelevant and immaterial. No foundation has been laid of any kind of character, and on the ground also that it is prejudicial to the rights of the defendants in this case.

The Court: He may answer.

A. Yes.

Q. Mr. L. R. Donnelly was the Division Manager at that time? [248]

A. That is right.

(Deposition of E. A. Darr.)

Q. I believe a suit was brought against the R. J. Reynolds Tobacco Company with the same defendants in that particular case as are the defendants in this case?

Mr. Merrill: Objected to as immaterial and incompetent for any purpose whatever and it is not connected with any matter on direct examination and it not proper in any sense as cross examination. It is not connected with any evidence or matters involved here and is prejudicial to the rights of the defendants.

The Court: He may answer.

A. I cannot answer without referring to the file as to whom the suit was brought against.

Q. Have you a record of the pleadings or the papers that were served on the R. J. Reynolds Tobacco Company in that suit?

Mr. Merrill: The same objections to that question.

The Court: He may answer.

A. It appears from the correspondence that Donnelly was joined as a defendant with the Company and Hair.

Q. You do not have a copy of the court pleadings in that case?

Mr. Merrill: To which we make the same objection as made to the question previously objected to. [249]

The Court: Overruled.

A. Well, not all the court pleadings. We have got here probably a copy of the complaint.

(Deposition of E. A. Darr.)

Mr. Merrill: We move to strike the answer on the ground that it is incompetent, irrelevant and immaterial and prejudicial.

The Court: Motion is denied.

Q. Was that complaint served on the R. J. Reynolds Tobacco Company?

Mr. Merrill: Objected to on the same grounds as made to the former question and that it deals with matters foreign to this suit and calls for a conclusion of the witness.

The Court: He may answer.

A. I am sure that it was.

Mr. Davis: I would like to offer a copy of the complaint in the Myers' case.

Mr. Merrill: We object to this offer on the ground that it is incompetent, irrelevant and immaterial for any purpose and it is prejudicial and not within the issues in this case.

The Court: Sustained.

Mr. Davis: Will the Court give me the right, if the showing is sufficient to justify it, to offer such portions of the complaint as would be [250] proper to show notice to the Company?

The Court: Yes, I will grant you that permission.

Q. Mr. Darr, when did you receive a report as to the accident in April, 1939? April 11, 1939?

Mr. Merrill: Objected to on the same grounds as heretofore stated.

The Court: He may answer.

A. On April 15, 1939.

(Deposition of E. A. Darr.)

Q. From whom did you receive that information?

Mr. Merrill: I would like to have a definite understanding that we may have an objection to each of these questions on the same grounds that we have heretofore objected on, with the right to interpose any additional objections we might have.

The Court: Yes, you may have that understanding. You will mention your objections of course. You may answer the last question.

A. From L. R. Donnelly.

Q. He is the same L. R. Donnelly, your division manager?

A. That is right.

Q. Did you have an investigation made of that accident which resulted in the death of Mr. Meyers?

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial to any issue here and it is [251] not proper cross examination, in addition to the previous objection stated.

Q. The Court: He may answer.

A. We received a complete report from Mr. L. R. Donnelly, and also from Mr. C. C. Roe, department manager, under whose supervision both Mr. Donnelly and Mr. Hair were working.

Q. Did you receive more than one report from Mr. Donnelly or Mr. Roe as to this accident on April 11, 1939?

Mr. Merrill: Same objection.

The Court: Same ruling.

A. We received the initial report of the accident, and we received supplemental reports.

(Deposition of E. A. Darr.)

Q. How many supplemental reports did you receive?

Mr. Merrill: The same objection.

The Court: Same ruling.

A. Well, there were quite a number of letters and telegrams in regard to developments in the case.

Mr. Davis: We would like to offer those exhibits, seven exhibits introduced as Plaintiffs' Exhibits B, C, D, E, F, G and H.

Mr. Merrill: We object to the offer as incompetent, irrelevant and immaterial, prejudicial and not having to do with the issues or parties here.

The Court: Overruled. [252]

Mr. Davis: I will read Exhibit B into the record:

“Plaintiffs' Exhibit B.

Tobaccos; Plug, Twist, Smoking, Cigarettes,
Products

R. J. Reynolds Tobacco Co.

April 17, 1939

Salt Lake City, Utah

Mr. Chas. C. Roe,

Enclosed please find a newspaper clipping that was cut from local paper. You will please note how the papers are playing up this accident. I know that the clipping is all wrong because I investigated the accident myself. I will try to give you an account of the accident.

Mr. Hair after leaving a cafe not quite a block away started to drive home going east on main

(Deposition of E. A. Darr.)

street, after going across the following street a man loomed up in front of him from between two cars coming from the right curbing, Mr. Hair immediately applied his brakes that were in good working order and swerved his car to the left the same time to try to miss the man. The man became confused and dodged back and forth and finally Mr. Hair hit the man a little to the left of the center line.

Mr. Hair was on the left because he tried to miss the man that was coming from the right. You are well acquainted with the narrow streets in Pocatello and one doesn't have to go far to be over the [253] center line as there are only room for two cars on these streets, opposite each other.

After hitting the man Mr. Hair stopped within twenty-five feet (car length) and then drove on a little farther to find a parking place along the curbing as there were cars lined up on both sides of the street. The distance he had to go to find this parking place was a little over 200 feet, the paper would make you believe that Mr. Hair could not stop within this distance. The police tried to place a drunken driving charge on Mr. Hair but this would not stick as they examined him and could not find that this was true, so they took this charge off and placed a manslaughter charge against him. The police had the company car parked on the street so every one could see it and cause public sentiment against Mr. Hair to strengthening their case against him. When I got to Pocatello I tried to have the car released but they only got tough about it and so

(Deposition of E. A. Darr.)

did I, they thought they could pull a bluff. It was late, around 10 P. M. Saturday so on Sunday I again went to the police station and pulled a bluff on them, I told them I was having papers drawn up not only to have our property placed in a garage to safeguard the tobacco in the truck but also was looking over the matter of the unjust advertising that was being created by our car out [254] on the street. I intimated that there might be a suit brought against the city due to this sentiment that was being caused against the company. Well they couldn't release the car fast enough. I placed it in a garage and invoiced the tobacco in it and took the tobacco over to Rino Cando Co., for storage. The car is damaged in front quite a little will have to have a new radiator and the engine gone over. I am having the Chevrolet dealer give me a bid on this car and then will find out how much it will take to have it repaired and will decide what is the best thing to do with it. I cannot have the car repaired until the first hearing that will take place on Wednesday or Thursday. I drove back to Salt Lake late Sunday and will work with Craig Tuesday on my way up to Pocatello. I will stay for the first hearing as no doubt they will call me for a witness and then set the time for the final trial.

My car is about to fall to pieces so will pick up a coupe in Ogden on my way through there. The one that we bargained for the sedan delivery will come in later. Yours very truly. L. R. Donnelly."

(Deposition of E. A. Darr.)

Mr. Merrill: We move now that the entire exhibit be stricken and the jury instructed to disregard it. Your Honor will notice that there isn't a word in that letter that could be interpreted as having [255] anything to do with this so-called waiver of instruction. It has to do entirely with the incident that we have heretofore called to Your Honor's attention and it is wholly incompetent, irrelevant and immaterial. We urge the striking of it, it is entirely immaterial for any purpose.

The Court: Motion denied.

Mr. Davis: Now, I offer Exhibit C as shown in the deposition and will ask permission to read it into the record at this point.

Mr. Merrill: We object to it as being incompetent, irrelevant and immaterial and prejudicial.

The Court: It may be admitted.

"Plaintiffs' Exhibit C. (Reporter's note: This is a regular Western Union Blank with tape glued on) Western Union. Received at CFA3 11—Salt Lake City Utah 15 730A R. J. Reynolds Tobacco Company, Winston Salem N. Car. R. D. Hair car struck and killed man Pocatello Particulars later. L. R. Donnelly."

Mr. Merrill: We move that be stricken and the jury instructed to disregard it on the ground that it has nothing whatever to do with any of the issues in this case. It cannot be interpreted in any way as tending to prove any so-called, or attempted waiver or what might be argued as a waiver in this case—

(Deposition of E. A. Darr.)

I refer to the waiver of the instruction as to the [256] hauling of a guest.

The Court: The motion is denied.

Mr. Davis: I now offer Exhibit D as shown in the deposition and made a part of the deposition.

Mr. Merrill: To which we make the same objection as to the previous exhibits.

The Court: Overruled, it may be admitted.

“Plaintiffs’ Exhibit D. Tobaccos; Plug, Twist, Smoking, Cigarettes, Products R. J. Reynolds Tobacco Company. Denver, Colorado, April 18, 1939. R J R I am attaching hereto a letter just received from Mr. Donnelly which is self-explanatory, together with a clipping relative to Mr. Hair’s accident in Pocatello.

You will notice Mr. Donnelly states the car is damaged to quite an extent, and it would be my suggestion instead of having it repaired, get offers from Chevrolet dealers in Pocatello and Ogden, and plan on replacing this car with a new Chevrolet Sedan Delivery.

Regardless of who is placed in the Pocatello assignment, if a new car is purchased he would not want to be driving a car around the streets that had had a misfortune such as the old one. In other words we would be starting out with a clean slate, and naturally it would also help to hold down comments, etc. Yours very truly Chas. C. Roe.”

Mr. Merrill: Now, we make the same motion [257] to strike, on the same grounds that were stated in our last motion to strike.

(Deposition of E. A. Darr.)

The Court: The motion will be denied.

Mr. Davis: I now offer Exhibit D as shown in the deposition and made a part of the deposition.

Mr. Merrill: To which we object upon the same grounds that we objected to the other exhibits and upon the grounds included in the motions to strike.

The Court: It may be admitted. You may likewise read that into the record.

“Plaintiff’s Exhibit number E. Tobaccos: Plug, twist, smoking, cigarettes. Products R. J. Reynolds Tobacco Co., Denver, Colorado April 18, 1939 R J R No doubt you have received word from Mr. L. R. Donnelly of Salt Lake City, relative to the car wreck that Mr. R. D. Hair had early Saturday morning, April 15.

Just as soon as Mr. Donnelly received word of this wreck he wired me brief details of what happened. I replied by wire for him to proceed to Pocatello and get full information as I planned on calling him long distance to see what actually took place.

Sunday afternoon, April 16, I called Mr. Donnelly in Pocatello and he informed me Mr. Hair had taken his wife to the station to catch an early morning train at 4:00 A M and as he was returning back through town on [258] Main street, which is a very narrow street, a street worker walked out between two cars. Mr. Hair ran into him which caused the street worker’s instant death. Mr. Donnelly stated that this street worker was an old man, about seventy years old and could not see or hear very well, however, both the street worker and Mr. Hair prob-

(Deposition of E. A. Darr.)

ably thought no one else was out or around at that hour of the morning, which caused this accident.

I called the Maryland Casualty Company early Monday morning and gave them what information I had and they wired their San Francisco Office the information I gave them.

Mr. Donnelly was not sure just when the hearing was to be held, either Monday or Tuesday of this week, but from the talk that was circulating around Pocatello, he thought Mr. Hair would be charged with manslaughter. I instructed Mr. Donnelly we would make no attempt to replace Mr. Hair until I arrived in Salt Lake City this week end, at which time I expect to have full information. Yours very truly, Chas. C. Roe. CCR: cas''

Mr. Merrill: I now move to strike the exhibit for the reasons stated in our other motions to strike.

The Court: Denied.

Mr. Davis: I offer Exhibit F which is a part of the deposition, and ask permission to read it [259] into the record.

Mr. Merrill: We object to the offer on the same grounds that we urged to the other exhibits and the grounds stated in our motions to strike.

The Court: It may be admitted.

“Plaintiff’s Exhibit Number F. (Reporter’s note: This is a regular postal telegraph blank with tape glued on.)

Postal Telegraph. CHA 19 59 NL XU—Salt Lake City Utah 23. R. J. Reynolds Tobacco Company.

(Deposition of E. A. Darr.)

Winston Salem, North Carolina. 1939 April 23,
P. M. 10 45

Hair is out on bond trial will be next month. Donnelly thinks he will come clear. Would you consider him to continue until outcome is known. Donnelly regrets losing Hair due to his sales ability and past results. If possible would recommend we let Hair continue Can have car repaired for small expense for time being. Wire Instructions. Chas C Roe''.

Mr. Merrill: We make the same motion to strike on the same grounds as heretofore urged.

The Court: Denied.

Mr. Davis: I am now about to offer Plaintiffs' Exhibit G as shown in and made a part of the deposition.

Mr. Merrill: To which we object on the [260] grounds stated in our previous objections and in our motions to strike.

The Court: Overruled, it may be admitted.

‘Plaintiffs’ Exhibit number G. Confirmation of serial message sent via Postal Telegraph Company. From R. J. Reynolds Tobacco Company Manufacturers of Cigarettes Smoking Plug and Twist Tobaccos Winston-Salem N C. Date April 24, 1939. Mr. Chas. C. Roe, c/o L. R. Donnelly, 532 Judge Building, 8 East Broadway, Salt Lake City, Utah.

Since Hair was using company car on personal business our disposition is to get his resignation. However, willing approve your recommendation as to continuing him provided he agrees to pay full cost repairs to company car. 2:15 P. M. EAD—h f''

(Deposition of E. A. Darr.)

Mr. Merrill: May our motion go to this also?

The Court: Yes, with the same ruling.

Mr. Davis: I am about to offer Plaintiffs' Exhibit H, which is a part of the deposition of Mr. Darr.

Mr. Merrill: To which we interpose the same objection as to the previous exhibits and also on the grounds stated in the motions to strike.

The Court: The objection will be sustained to this exhibit.

Mr. Davis: May I call Your Honor's attention to the second paragraph on page eight, I wanted to [261] offer this for the purpose of showing what Mr. Hair's activities were and that it was reported to the Company.

Mr. Merrill: It would be immaterial for any purpose. It has no bearing on any of the issues here and would be prejudicial, and we also object on the other grounds heretofore stated.

Mr. Davis: I will withdraw the offer at this time and ask the Court that I may have permission to re-offer this at a later time. I believe I will be able to introduce matter which will entitle me to offer this.

The Court: Yes, that may be understood, but I will sustain the objection at this time.

Mr. Davis: I have withdrawn the offer.

The Court: Very well.

Mr. Davis: Now I will continue with the deposition.

Q. Mr. Darr, did those reports or your informa-

(Deposition of E. A. Darr.)

tion show that Mr. Rulon D. Hair had with him at the time of the wreck of April 11, 1939, a guest in his car?

A. It showed that he did not have a guest with him at the time of the accident.

Q. Didn't you learn later that a man by the name of Esterly was a guest in the car at that time?

A. I have never received any such information. [262]

Q. Mr. L. R. Donnelly attended the preliminary trial in which Hair was indicted for manslaughter, didn't he?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and has no bearing on any issue in this case. It is prejudicial and not proper cross examination.

The Court: He may answer.

A. I am unable to say.

Q. You don't know whether he was there or not?

A. I do not know.

Q. Do you know that it was shown in the evidence of that trial there was a man by the name of Esterly or some other guest with him at the time of that accident.

A. I do not.

Q. You don't know that it was shown in the evidence of that trial there was a man by the name of Esterly or some guest with him at the time of the accident?

A. I do not.

Q. You never had any such information?

A. No.

Q. You knew that Hair was convicted of man-

(Deposition of E. A. Darr.)

slaughter, did you not, in the criminal courts of Idaho, in that particular wreck?

Mr. Merrill: That is objected to as incompetent, irrelevant and immaterial; it is prejudicial [263] and has no bearing on any issue properly before the Court in this case, this is made in addition to any other grounds stated to our objections heretofore made to this line of testimony.

The Court: Objection sustained.

Q. Don't you know, Mr. Darr, that he was convicted of involuntary manslaughter and paroled for a period of two years?

Mr. Merrill: We make the same objection.

The Court: Sustained.

Q. Did you or the R. J. Reynolds Tobacco Company ever receive a report from the Parole Officer who had charge of the case of Rulon D. Hair?

Mr. Merrill: We make the same objection to this question.

The Court: Sustained.

Q. Well, you knew, Mr. Darr, didn't you, that upon the conviction of Rulon D. Hair for manslaughter as the result of the wreck or accident of April 11, 1939, that his license to drive a car would be cancelled, didn't you?

Mr. Merrill: We object on the same grounds as our other objections which were sustained. We feel that this should not be read to the jury.

The Court: Sustained.

Q. Do you know that Mr. Rulon D. Hair had a license to operate an automobile? [264]

(Deposition of E. A. Darr.)

Mr. Merrill: The same objection as heretofore made.

The Court: Overruled.

A. I did not. I assumed that he had.

Q. You had no record of that at all?

A. No.

Q. From the time he first was employed by the company, up until this last accident?

A. We don't require that proof to be given us that a man has a license. We assume that he has one.

Mr. Davis: I take it that the Court would sustain an objection to the next question so I will not read it. I will read the question at the bottom of page 41.

Mr. Smith: The Court has ruled out that question and answer.

Mr. Davis: Very well, I will forego that. Now, the first question on page 42 of the deposition.

Q. Did you know that Mr. Rulon D. Hair was convicted of reckless driving on July 22, 1929, at and near Boise, in the State of Idaho, and fined \$50.00 and the cost?

Mr. Merrill: That is objected to as being prejudicial?

The Court: Sustained.

Q. Did you know that the record of that indictment was [265] published in the Idaho Falls Post Register of that date?

Mr. Merrill: The same objection.

The Court: Sustained.

Q. Mr. Donnelly or no superior officer never made any notice of that fact, or report of that fact to you, did they? A. No, sir.

(Deposition of E. A. Darr.)

Q. I believe you stated in a former interrogatory that you did have on one occasion a statement that Mr. Hair had had his wife as a guest on some trip to a station? I believe that is right, isn't it?

A. That was in connection with the April 1939 accident. He had taken his wife and daughter to the station, and the accident occurred on his way home.

Q. When did you get a report of the accident of September 11, 1942, in which Avenell Newby was killed?

A. The notice was—the notice to us was received on September 17, 1942, in a letter from Mr. Donnelly, letter of the 15th.

Mr. Merrill: That is objected to as being incompetent, irrelevant and immaterial; not proper cross examination and it is prejudicial.—I will make this in the form of a motion to strike the answer.

The Court: Motion denied. [266]

Mr. Davis: I am now reading from the deposition: "we would like to introduce that letter in evidence. Letter of September 15, 1942, from Mr. Donnelly marked "plaintiff's exhibit No. I, (eye). This exhibit is attached to the transcript."

Now, if the Court please, I offer that identical exhibit marked Exhibit 14 and which was attached to the transcript.

Mr. Merrill: We object to the admission of the exhibit as it is incompetent, irrelevant and immaterial, and it is not proper cross examination.

(Deposition of E. A. Darr.)

The Court: It may be admitted.

“Tobaccos: Plug, Twist, Smoking, Cigarettes, Products R J Reynolds Tobacco Company. Office of L. R. Donnelly, 213 Judge Building, P O. Box 1115. He had accident in April 1939 in which pedestrian was killed, R D M. Salt Lake City, Utah September 15, 1942. R J R. As a matter of information concerning an accident involving Mr. R. D. Hair in which his car was completely demolished and considerable of his merchandise lost or stolen.

Mr. Hair called me Saturday morning September 12 and informed me that he had had an accident twenty two miles north of Montpelier, Idaho. Since Mr. Hair did not give me all the details of the accident when he [267] called me, I naturally assumed that the accident was one of the usual nature. I had car number 8712 taken out of dead storage and serviced with the expectation of turning this car over to Mr. Hair. However, upon my arrival at Montpelier at 12:00 noon further details came to light upon my investigating further.

While Mr. Hair was traveling south on highway number 30, twenty-two miles north of Montpelier he approached a semi-truck and trailer which was over the center line thus causing Mr. Hair to drive onto the shoulder of the road which had become soft due to heavy rains. This threw his car somewhat out of control and in the interim he hit a rock with his right front tire causing it to blow out. This then caused his car to become completely uncontrollable. The car rolled over several times scattering tobacco

(Deposition of E. A. Darr.)

and cigarettes all over the highway. A married woman passenger whom Mr. Hair had picked up was severely injured and was in need of immediate medical attention,—this he did not mention in his first report—as was also Mr. Hair since he received a blow on his left ear. A passing motorist took them both to a hospital in Montpelier, Idaho, where medical attention was administered. After receiving medical attention Mr. Hair notified the Sheriff of the accident, but apparently before the wrecker arrived at the scene of the [268] accident some of the merchandise was stolen by several passing motorists, according to eye witnesses at the scene of the accident. A list of the merchandise stolen will be sent to you along with his financial obligations to the jobbers.

After conferring with the doctor who was taking care of the woman involved I was informed that her condition was very serious and that she had a fifty-fifty chance of surviving. Her injuries are internal and she is so seriously injured that X-rays are impossible at the present time.

Since Mr. Hair violated all Company rules and instructions concerning the carrying of passengers I felt that I had to ask for his resignation which I did. His resignation is enclosed with other papers relative to the accident.

In car number 8712 I took all the tobacco that was left and traded it in against outstanding receipts to a jobber located at Pocatello, Idaho.

Two bids which I received on the wrecked car are

(Deposition of E. A. Darr.)

enclosed and because—car record attached,—of a time limit set by the bidders immediate action concerning acceptance is paramount. The towing charges on the wrecked car were paid by me and reported on my report. The car is in dead storage at Ford Garage at Montpelier [269] Idaho. Yours very truly,
L. R. Donnelly'' and there are the initials C C;
C C R

Q. Is that the only report you received as to this accident?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: He may answer.

A. Well, we received a regular form of accident report that salesmen are supposed to submit when they have an accident, and we received one of those from Mr. Hair. In fact, we received two,—the first reports an accident and it doesn't show he was carrying a passenger.

Mr. Davis: There were attached to the transcript of the deposition exhibits marked J and K and I now offer exhibit marked 15 which was J in the deposition.

Mr. Merrill: To which we object as being incompetent, irrelevant and immaterial and not proper cross examination.

The Court: It may be admitted.

Mr. Davis: May I have the privilege of reading only a portion of this, that was our agreement.

Mr. Merrill: Certainly.

(Deposition of E. A. Darr.)

Mr. Davis: "Notice,—In the event of an accident however slight, fill out this blank in detail and mail to office named below. [270]

Report of Automobile Accident.

Name of Owner: R. J. Reynolds Tobacco Company

Business Address: Winston-Salem

Home address: Winston-Salem, State: North Carolina.

Date of Accident: September 11, 1942.

Name of person in charge of machine: R. D. Hair.
Age: 30. Business address of person in charge of Machine: 209 South 7th.

Home address of person in charge of Machine: 209 South 7th. City: Pocatello, State: Idaho.

Manufacturer's name Chevrolet. Model; 1941.

Engine No. A A 517 606. Manufacturer's No. 6AG02-15629.

License No. 3A150. Was operator licensed? Yes.

For how long had he operated an automobile? 12 years.

In what direction was your vehicle going? South.

Rate of speed. 40 miles. Was driver on own business or that of owner? Owner. What side of street? Extreme right side." There is a good deal more to the report which I do not think is pertinent and I will not read it at this time. It is signed by R. D. Hair.

I will now offer in evidence Plaintiffs' Exhibit 16.

Mr. Merrill: To which we object on the ground

(Deposition of E. A. Darr.)

that it,—well I will make the objection on the same grounds as made to the previous exhibit.

The Court: It may be admitted. [271]

Mr. Davis: "Report of Automobile Accident.
Name of owner: L. R. Donnelly.

Business Address: 532 Judge Building, Salt Lake City.

Home address: 1365 East 13th South; City: Salt Lake City; State: Utah.

Date of accident: 9-11-42. Hour: 4:15 P. M.

Name of person in charge of machine: R. D. Hair
Age: 30.

Business address of person in charge of machine:
229 South 7th. Home address of person in charge
of machine: Same City, Pocatello, Idaho.

Manufacturer's name: Chevrolet. Model: 1941

Engine No: AA517-606. Manufacturer's No.
6AG02-15629

License No. # 3A-150

Was operator licensed? Yes. For how long had
he operated an automobile? 12 years.

In what direction was your vehicle going? South.

Rate of speed. 40 miles

Was driver on own business or that of owner?
Owner

What side of street? Extreme right side.

Were you blowing a horn or sounding a gong at
the time? No.

Were all your light lit? No.

If a collision in what direction was other vehicle
going? North.

(Deposition of E. A. Darr.)

What side of street? Right and center. Rate of speed? [272] Unknown.

Who was operator of other vehicle? He wasn't aware of accident.

License number of other vehicle? And didn't stop.

Who was to blame for the collision? Soft shoulder and rain

Injured's name? Avenell Newby. Address: Montpelier.

Injuries: Internal injury, unknown.

Which injured was in your car? Avenell Newby.

Where taken after the accident? Bear Lake Hospital, Montpelier, Idaho.

Was Doctor called? If so, Who? R. B. Lindsay. Address: Montpelier, Idaho

Describe damage to property other than your own? None.

To what extent was damage done to your property? Body total wreck.

Cause of accident Soft shoulder, rain and blown out tire."

The rest I am not going to read. I will continue with the questions and answers in the deposition.

"Q. Were any other investigations made by the R. J. Reynolds Tobacco Company or anyone for them other than Mr. Donnelly's report?

A. No further investigation made since his resignation was immediately requested.

Q. I am talking about the accident, though. Was any other report made of the accident other than Mr. Donnelly's?

(Deposition of E. A. Darr.)

Mr. Merrill: Objected to as incompetent, [273] irrelevant and immaterial and not within the issues. It calls for a conclusion of this witness and no foundation is laid.

The Court: Sustained.

Q. Mr. Darr, was this automobile registered there in the name of the R. J. Reynolds Tobacco Company or Mr. L. R. Donnelly?

A. L. R. Donnelly.

Q. The title to the car, though, was really in the R. J. Reynolds Tobacco Company?

A. Legal Title was in L. R. Donnelly.

Q. Well, is that the way you handle your cars in the territory of your salesmen, you put them in the name of the Division managers?

A. I think that is universal. I think that is the general practice.

Q. But the title to the car was registered in the name of L. R. Donnelly?

A. That is right.

Q. But was really the property of the R. J. Reynolds Tobacco Company.

A. That is right.

Q. You say that you register all cars of the Company in the name of the Division Managers in the various territories.

Mr. Merrill: Objected to as incompetent, [274] irrelevant and immaterial for any purpose. Having nothing to do with the issues in this case.

The Court: Overruled.

(Deposition of E. A. Darr.)

A. That is the general practice. There may be some exceptions.

Mr. Davis: I will not ask the next question because the Court has ruled on that as a matter of pleading. I will turn to the middle of page 46.

Q. Was that any reason why the car would have been listed or registered in the name of L. R. Donnelly?

A. Cars are registered in Division Managers names merely for convenience.

Q. Did you give your division manager, Mr. Donnelly, instructions with reference to the salesmen under him using the automobiles?

A. Oh, yes.

Q. The same instructions that you gave to Hair with reference to riding guests? A. Yes.

Q. And if your division manager, Mr. Donnelly, or any Division Manager found that a salesman was violating or knew of a violation of the salesman with reference to the hauling of guests or passengers, then it would be his duty to report that to you, would it not? A. Yes.

Q. And if Mr. Donnelly had any such evidence there, he failed to report that fact to you, didn't he? [275]

A. That is right. We have had no such report.

Q. You never heard or no report ever came to you that Mr. Hair ever hauled any passengers, ever hauled any guests in the Company's car with the exception of his wife, when he brought her to a station and had the first wreck in 1939, and this last

(Deposition of E. A. Darr.)

wreck involved in this litigation in which Mrs. Newby was killed?

A. They are the only cases that have come to my attention or the attention of the company.

Q. Did any insurance company make any report to you as to the investigation of either one of these wrecks?

Mr. Merrill: Objected to upon the ground that it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Was there anything in those reports with reference to Mr. Hair hauling passengers or drinking or being intoxicated?

A. Not that I recall.

Q. Mr. Darr, did you receive any information or notices of any other wrecks of the Company's car while Mr. Hair was using it in driving it, up until this last wreck? A. No, none at all.

Q. Did you receive any unusual repair bills?

A. None that would indicate any accident; otherwise, he would not have gotten three commendations for driving three years without an accident. [276]

Q. Who gave you the information for your answer to interrogatory number 30?

A. This information was reported by attorneys representing R. J. Reynolds Tobacco Company and L. R. Donnelly in this case as the result of investigation made by them.

Mr. Merrill: We move to strike that last as entirely incompetent for any purpose, it is irrelevant in this case.

(Deposition of E. A. Darr.)

The Court: It may be stricken.

Mr. Davis: I have no objection to it going out.

Q. Was Montpelier, Soda Springs and Grace, Idaho, in Rulon D. Hair's district or territory on September 11, 1942?

A. They were in his assigned territory on September 11, 1942.

Mr. Davis: Now, Your Honor, I take it that counsel is privileged to introduce the direct examination if they desire. Do you want me to read the examination for you Mr. Merrill?

Mr. Merrill: No, we will have Mr. Smith read our direct examination.

Mr. Davis: I will be glad to accommodate you if you want me to do it.

Mr. Merrill: May it be understood that we deem it necessary for the understanding of the jury that this direct examination be read at this time rather [277] than to permit various witnesses to come in between the two parts of the examination.

Mr. Davis: We have no objection to any procedure you want to follow.

The Court: It may be so understood.

(Whereupon the following deposition was read by Mr. Smith.)

“E. A. DARR

Called as a witness on behalf of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, having been first duly sworn on the Holy bible to

(Deposition of E. A. Darr.)

tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

Q. Will you please state your name?

A. E. A. Darr.

Q. Where do you reside?

A. Winston-Salem, N. C.

Q. What is your present employment, Mr. Darr?

A. Manager of the Sales Department of the R. J. Reynolds Tobacco Company.

Q. How long have you been connected with the R. J. Reynolds Tobacco Company?

A. Twenty three and a half years.

Q. How long have you held the position as Sales Manager? [278]

A. Since December 1937

Q. Do you hold any other position with the R. J. Reynolds Tobacco Company other than Sales Manager?

A. I am also a Director of the Company, having been elected in December 1937.

Q. What are your duties generally, as Sales Manager, with respect to the Company's salesmen?

A. I have general supervision of all the salesmen all over the United States.

Q. Had Rulon D. Hair been acting as a salesman for the R. J. Reynolds Tobacco Company prior to September 11, 1942? A. Yes.

Q. When did he first become a salesman for the Company, if you know the approximate date?

A. He was employed July 20, 1937.

(Deposition of E. A. Darr.)

Q. Mr. Darr, is there any other officer of the Company besides yourself who would know anything about the transactions of Rulon D. Hair in his capacity as a salesman for the Company?

A. No.

Q. To which officer of the Company would such information come?

A. To this office.

Q. Is there any other officer of the Company other than to [279] yourself to whom such information would come? A. None.

Q. Which officer, if any, of the company, would have supervision of the instructions or rules that might be given to Rulon D. Hair from time to time regulating his activities as a salesman for the Company?

Mr. Davis: I will waive that objection.

A. No one but myself.

Q. Was a Chevrolet panel truck owned by the R. J. Reynolds Tobacco Company turned over to Mr. Hair in February of 1942 for his use as a salesman for the Company?

A. That is correct, February 8, 1942. He had previously had a car.

Q. He had previously had a car that belonged to the Company?

A. That is right. This just another car, a new car.

Mr. Merrill: With respect to matters pertaining to the car and the instructions given him relative to hauling guests in the car we are under the necessity

(Deposition of E. A. Darr.)

of introducing that from the deposition by reason of the testimony heretofore introduced by the plaintiff, being the cross examination of Mr. Darr, and we are introducing that with the definite reservation of all the objections which we have heretofore made to any of the questions and answers heretofore given [280] touching the Myers incident or any other incident that may be interpreted as showing in any sense a waiver of these instructions. We want it understood that we are preserving those objections.

The Court: That is your understanding. You fix this in the record the way you want it.

Mr. Merrill: We don't want these objections waived by reason of this testimony as to hauling quests.

The Court: The Court wants the jury to know all the facts on both sides of this matter. I don't want to prohibit counsel from making their record here. However, if you have objections to your own questions I don't know just how that will be handled by you.

Mr. Merrill: We have to put this in and I want to reserve our objections to the questions that Mr. Davis has interposed without any argument being later raised that we have waived those objections by introducing this deposition.

The Court: That is a matter entirely up to you as to how the matter is handled in the record.

Q. What instructions, if any, Mr. Darr, were given by the R. J. Reynolds Tobacco Company to

(Deposition of E. A. Darr.)

Mr. Hair as to hauling or carrying guests or passengers in this truck?

A. These instructions were contained in a printed form which [281] was signed by Hair at the time the car was turned over to him.

Q. You have before you the printed form signed by Mr. Hair about which you have just testified?

A. Yes.

Mr. Smith: The R. J. Reynolds Tobacco Company and L. R. Donnelly offer for identification the paper writing referred to by the witness, and ask that it be marked as defendants' exhibit.

Mr. Merrill: I guess it will be marked as number 17 here.

Mr. Smith: The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly offer in evidence the paper writing just referred to, and ask that it be taken as a part of the deposition of witness E. A. Darr.

Mr. Davis: We have no objection. I know what it is.

Mr. Smith: "Salesman's agreement to whom car is delivered. R. J. Reynolds Tobacco Company, Winston-Salem N. C. This will certify that there was delivered to me this 8 day of February 1942, at Salt Lake City, Utah (State) one Sedan Del. Chev 6 1941 Model A A Sedan Del. Motor Number A A 517606, Silver Tag Number 9020, with the regular and special equipment, as fully explained in your letter of instructions which I have [282] carefully noted, and which I do hereby agree to observe in

(Deposition of E. A. Darr.)

operating car, and same will be followed to the best of my ability in making my services of more value as a salesman, while the car is in my charge. I further agree that I will be responsible for the car, its parts and equipment; and upon request will turn same over to you, your successor, or a duly authorized representative of R. J. Reynolds Tobacco Company.

(I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my division manager. I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in the said car.

(Witness L. R. Donnelly, Division Manager's signature.)

R. D. Hair, (Salesman sign here)''

There seems to be some other initials on this exhibit G. R. B, J. A. W; G. R. B; E. B. W and J. A. W.

Q. Was the Chevrolet truck referred to in this paper writing delivered to Mr. Hair by the Company at the time this paper was signed?

A. Simultaneously.

Q. Mr. Darr, is the prohibition against the hauling of pass- [283] engers and guests a general rule of the R. J. Reynolds Tobacco Company, applicable to all salesmen using company owned automobiles?

A. It is.

(Deposition of E. A. Darr.)

Q. Is that or is that not a fixed rule of the Company?

A. Fixed rule.

Q. Now, in addition to the paper writing offered in evidence as Defendant's exhibit 1,—it is admitted as exhibit 17 in this case,—were any other written instructions given by the R. J. Reynolds Tobacco Company to Mr. Hair with respect to his hauling guests or passengers in any vehicle belonging to the R. J. Reynolds Tobacco Company?

A. It is a matter of constant practice for the Company to keep salesmen reminded, both by direct communications and through division managers and department managers who supervise salesmen's work, that under no circumstances must they carry any passengers with them other than employees of the Company. On that point, here is a form letter dated November 4, 1937, which Mr. Hair received and of which we have his signed acknowledgment, where that rule is again called to his attention in the last paragraph, reading as follows: "You must not carry other passengers with you when using the car, except your Division manager or an employee of the Company." [284]

Q. Was a copy of the letter of instructions to which you have just referred, sent to Mr. Hair?

A. It was.

Q. Is this paper to which you have just referred, an exact copy of the letter of instructions and directions sent to him.

A. That is an exact copy."

(Deposition of E. A. Darr.)

Mr. Smith: The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly offer for identification the paper just referred to by the witness and ask that it be marked Defendants exhibit 18.

The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly thereupon offer their exhibit 18 in evidence and ask that it be taken as a part of the deposition of the witness E. A. Darr.

Mr. Davis: To which I have no objection, they don't need to show it to me. I am familiar with it.

It is printed in the deposition but this is not the instrument which is handed to me. As far as I am concerned it may be copied from the deposition.

The Court: We will take a ten minute recess and you can straighten this out.

4:25 P. M. March 20, 1945

Mr. Merrill: As a correction in the listing of the exhibits we wish to have the exhibit appearing in [285] the deposition and which is there attached as exhibit 2 considered now as defendants' exhibit 18.

The Court: I think it was so marked.

Mr. Davis: I have no objection to your reading it into the record.

Mr. Merrill: Let's have the reporter strike these remarks and start over. Now, we make the offer at this time, to conform with the other marking on the exhibit, we offer exhibit number 18 and ask that it be deemed so marked.

The Court: It may be so deemed marked.

Mr. Smith: "Defendants exhibit 18. Directors:

(Deposition of E. A. Darr.)

Jas. A Gray, President. R. E. Lasater, Vice president. J. W. Glenn, Vice President. John C. Whitaker Vice President. M. E. Motsinger, Secretary. S. Clay Williams, Chairman Board of Directors. W. N. Reynolds, Chairman Executive Committee. R. C. Haberkern, Purchasing Agent. L. F. Owen, Traffic Manager. H. S. Stokes, Supt Leaf Processing. P. Frank Hanes, Counsel. E. A. Darr Mgr. Sales Dept. R. J. Reynolds Tobacco Company, Winston Salem N. C. November 4, 1937. S-22 c-c-

To Our Salesmen Operating Automobiles:

We are sending you herewith accident report blanks. In case of accident, make out report of accident in triplicate, and send all three copies to your Division [286] Manager. In case you have a serious accident, report it to us by wire and follow up your wire with a report of accident as above requested by first mail.

In filling out the report blanks it is imperative that you answer fully every question appearing thereon. If an accident occurs and you are not at fault you should endeavor to secure settlement from the party causing the accident on the spot. As we do not carry insurance covering damage to our car, we therefore have to look to the other party for damages sustained by us.

You must not carry other passengers with you when using the car, except your Division Manager or an employee of the Company. R. J. Reynolds Tobacco Company. 'I'D walk a mile for a camel'."

Q. Mr. Darr, do you have the signed acknowl-

(Deposition of E. A. Darr.)

edgment of the letter of instructions just referred to which you received from Mr. Hair?

A. The original acknowledgment was sent to lawyers in connection with a previous case in 1939.

Mr. Merrill: We now offer to be marked as exhibit 19 the answer to this letter that has just been read.

Mr. Davis: No objection to its admission.

The Court: It may be admitted.

Mr. Merrill: I will read this exhibit 19 [287]

“Winston-Salem N. C. November 4, 1937. To Our Salesmen: We enclose S-22-c-c. As we desire to know that our salesmen thoroughly understand all notices, offers, letters and circulars mailed to them by us, we request that you give us, in your own language, over your signature, the points which you gather from the above enclosure. Yours very truly, R. J. Reynolds Tobacco Company. Town, Idaho Falls, State, Idaho, Date March 17, 1938. S-22-c-c. In case of an accident I am to fill out accident report in triplicate sending all three copies to my division manager. Or if it is a serious accident I shall wire you immediately following it up with the regular form.

I will answer every question fully and if the other car is at fault I will endeavor to make settlement on the spot.

I should never carry any passengers outside of my division manager. R. D. Hair, Salesman.

This report must have your immediate attention.

(Deposition of E. A. Darr.)

In this space name of your Division Manager.
L. R. Donnelly.

Q. Are they the same attorneys who are defending this present suit? A. Yes.

Q. As far as you know, do they now have that signed acknowledgment by Mr. Hair. [288]

A. It was sent to them.

Q. Did you have any knowledge or information that these instructions and rules of the Company with respect to carrying guests or passengers had been violated by Mr. Hair at any time?

A. In one instance only, in connection with an accident that the salesman had in April, 1939, when it was found that he had taken his wife and daughter in a Company car to the railroad station and had an accident on his return home.

Q. What action, if any, did the company take with respect to that violation, Mr. Darr?

A. We gave serious consideration to getting Mr. Hair's resignation; but after considerable thought, I decided to give him another chance. But we penalized him to the extent of making him pay \$70.95 repair bill to cover damage suffered by the company car.

Q. What instructions, if any, were given him at that time as to his observing this regulation or rule?

A. He was told by his Department Manager that if he was ever found to be carrying passengers in the future, there would be no second chance.

Q. Do you or the Reynolds Tobacco Company have any knowledge or information about any other occasion on which Mr. Hair hauled or carried any

(Deposition of E. A. Darr.)

passengers or guests in this [289] truck or any other truck owned by the Reynolds Tobacco Company?

A. None.

Q. Was any report ever made to you or to the Company to the effect that Mr. Hair had hauled a woman in the Company's truck in Dubois, Idaho, or at any other place?

A. No such report ever reached me or the Company.

Q. I direct your attention to an allegation in the complaint that the R. J. Reynolds Tobacco Company knew that Rulon D. Hair was in the habit of hauling guests in the Company's truck contrary to instructions, and I ask you if that allegation is true?

A. It is not true.

Q. Have you or the Company ever been informed of Mr. Hair being arrested on a charge of reckless driving?

A. No such report has reached me or the Company.

Q. Did you or the Company ever receive any information indicating that Mr. Hair was a careless or reckless driver?

A. Never have.

Q. What reports, if any, have you or the R. J. Reynolds Tobacco Company received concerning any accident in which Mr. Hair was involved while operating a Company truck or any other vehicle?

A. None other than the one in April, 1939, previously mentioned. [290]

Q. Is that the case in which some pedestrian was killed?

A. Yes, sir.

(Deposition of E. A. Darr.)

Q. What has Mr. Hair's record been with the Company as to being a careful and competent driver, Mr. Darr?

A. He has a record since April 1939, up to September 11, 1942, of having had no accident in connection with the Company car, and has received letters of commendation along with merchandise awards in April, 1940, April 1941 and April 1942, which he won as the result of having maintained a clear record.

Q. What form of recognition was given to him for this record?

Mr. Davis: I object to this as it calls for a self-serving declaration and it is immaterial. The witness has testified without objection that the man had a clear record, now this is a self service declaration.

The Court: He may answer.

A. I have before me a carbon copy of a letter addressed to Mr. Hair dated June 12, 1940, commending him on a 12 months clear record. A carbon copy of a letter dated July 16, 1941, commending him on a clear record for two successive years without an accident. And a carbon copy of a letter dated July 29, 1942, commending him on a three-year clear record without an accident.

Q. State whether or not the originals of these letters were mailed from this office, from your office as Sales [291] Manager, and under your supervision, to Mr. Hair on the dates indicated?

A. They were.

Q. Are those papers you have before you the

(Deposition of E. A. Darr.)

exact carbon copies of the originals of the letters mailed to Mr. Hair?

A. They are exact carbon copies so far as the filling in of Mr. Hair's name is concerned. The body of the letter is a form that we use, and is multi-graphed to save typing a great number of letters.

Mr. Smith: The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly offer for identification the three paper writings referred to by the witness, and ask that they be marked as Defendants exhibits 3, 4 and 5 respectively.

Mr. Merrill: They would be marked 20, 21 and 22 now, and we offer them in evidence at this time.

Mr. Davis: We object to the introduction as they are self-serving, immaterial, incompetent, and hearsay. It has been testified here they sent him such letters, and they contain matters not competent in any way here.

Mr. Merrill: It is simply following up the testimony of the witness and corroborating him.

The Court: The objection is sustained. I can't see that they are material here. [292]

Mr. Merrill: May it please the Court. With reference to these exhibits we wish to renew our offer and call to your Honor's attention the fact that the plaintiffs themselves opened this up in reading the cross examination of this witness to the jury, on page 48 of the deposition which they produced, they got in evidence this answer: This is a part of the answer: "He would not have gotten three commendations for driving three years without an accident." The question was "Did you re-

(Deposition of E. A. Darr.)

ceive any unusual repair bills?" and the answer: "None that would indicate any accident; otherwise, he would not have gotten three commendations for driving three years without an accident."

They placed that in evidence and we have a right now to follow it up and produce the entire record.

The Court: I think that any commendation he received,—the fact that he did receive it would be immaterial. However, Mr. Merrill, if you think it is material I will admit them and the jury can judge the weight. However, they do seem immaterial to me at this time, but I will admit them.

Mr. Merrill: I will read them to the jury at this time. This is exhibit 20.

"June 12, 1940. Mr. R. D. Hair, 209 South 7th St., Pocatello, Idaho. [293]"

Dear Mr. Hair: We are greatly pleased at being able to send to you the enclosed card and key ring token as evidence of the fact that you have operated your Company car for a period of twelve months ending April 15, 1940, without an accident.

Thousands of automobile drivers in America are carrying or wearing tokens like this. Some have them engraved for '2 years' and a few for '3 years'. This simply means that for one year, or two years or three years, they have successfully done their share towards saving lives on the highways by keeping themselves out of accidents. They have so well lived up to the rules and ideals of safe driving that they have been able to keep out of

(Deposition of E. A. Darr.)

even those scrapes for which others would have been to blame.

These no-Accident awards are not easy to win. They almost always mean that the operator of an automobile who has merited these awards has put real thought and effort into the matter of driving safely. They are not given for 'good intentions' but are given only to those who have delivered the goods, a reward for definite accomplishment in dodging the hazards that are encountered daily on the highways.

So we congratulate you on your clean twelve months record, and we hope that this time next year we [294] can exchange the enclosed for a two year token.

With best wishes, we remain,"

Mr. Merrill: Now I will read from exhibit 21, defendants 21.

"July 16, 1941. Mr. R. D. Hair, 209 South 7th St., #4 Pocatello, Idaho.

Dear Mr. Hair: We are glad indeed to inform you that according to our records you are now eligible to receive the two year no accident award for having driven Company car for two successive years without an accident. It is with pleasure that we send you herewith your new emblem.

We congratulate you on this fine record and thank you for the part you have played in helping make the highways safer. We hope that next year this time we will have the pleasure of presenting

(Deposition of E. A. Darr.)

you with a three year emblem. With best wishes, we remain, Your very truly."

Mr. Merrill: I am now going to read from Defendant's exhibit 22.

"July 29, 1942. Mr. R. D. Hair, Box 1166 Pocatello, Idaho. Dear Mr. Hair: According to our records, as of April 16, you have driven a Company car for a period of three years without becoming involved in an accident. We want you to know that we appreciate the record thus made by you. We, therefore take great pleasure in sending you [295] our sincere congratulations and hope you will continue this fine record.

It is also with pleasure that we are sending you herewith the enclosed, which evidence the fact that you have operated a car for a period of three years without an accident.

We hope that these awards will be a constant reminder to you of the very definite fact that it pays to drive carefully.

May we, therefore, again offer you our congratulations and express the very genuine hope that we may have the pleasure of congratulating you on the completion of four years of proper and sane driving.

With our best wishes, we beg to remain. Yours very truly."

Q. Mr. Darr, I direct your attention to an allegation in the complaint that the R. J. Reynolds Tobacco Company knew that Rulon D. Hair was

(Deposition of E. A. Darr.)

a careless, reckless, and incompetent driver of an automobile, and I ask you if that allegation is true?

Mr. Davis: I object to this; the deposition has been read in its entirety up to this point and it has all been covered, this is repetition.

Mr. Merrill: Read the next question.

Q. Did you or the R. J. Reynolds Company ever acquire any [296] knowledge or information that Mr. Hair was in the habit of hauling guests in the Company's truck.

Mr. Davis: I have no objection except that this was all read and answered and gone over at least once and it seems to me that it is a question for the jury and not this witness.

Mr. Merrill: Read the next question, Mr. Smith.

Mr. Davis: I will read,—oh pardon me, I will object to the next question also, that deposition has all been read.

Mr. Merrill: Very well, that is all the direct examination. Do you want to read the re-direct examination, Mr. Davis?

Mr. Davis: No, it is yours, not mine. Go ahead and read it.

Redirect Examination

Q. Mr. Darr, I direct your attention to Defendant's 1, heretofore introduced in evidence, being entitled "Salesman's agreement to Whom Car is Delivered", and ask you if you know the two signatures appearing on this instrument?

A. I do.

(Deposition of E. A. Darr.)

Q. Whose signatures are they?

A. One is the signature of R. D. Hair and the other is the signature of L. R. Donnelly.

Q. Where has this paper been kept since it was executed, Mr. Darr? [297]

A. In our files, as a permanent record.

Q. Are those files kept under your supervision as Sales Manager for the R. J. Reynolds Tobacco Company?

A. They are.

Mr. Smith: That is the end of the deposition.

L. R. DONNELLY

recalled for cross examination under the rules, having heretofore been duly sworn, testifies as follows:

Cross Examination

By Mr. Davis:

Q. Mr. Donnelly, I am going to interrogate you concerning the letters introduced from Mr. Darr's testimony and for your information and in fairness to you, if you want to take the deposition and turn to page 34, I am going to ask you about a matter that appears there.

Mr. Merrill: We shall object to this, in any event it would necessarily be on their redirect in this case and not in the case in chief.

The Court: Overruled. I understand that he is called for cross examination under the rules.

(Testimony of L. R. Donnelly.)

Q. I refer to exhibit "E" being a letter from Charles E. Roe, and call your attention to the following: "Just as soon as Mr. Donnelly received word of this wreck he [298] wired me brief details of what happened. I replied by wire for him to proceed to Pocatello and get full information as I planned on calling him long distance." Did you receive that wire to come to Pocatello and get that information? A. I did.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and does not pertain to any issue of this case.

The Court: Overruled. The answer may stand.

Q. As a result of that wire you came up as suggested to Pocatello and made a complete investigation, didn't you? A. Yes, sir.

Q. You were representing Mr. Roe and going under instructions from him.

A. I was representing the Company.

Q. What is his position.

A. He was my immediate superior.

Q. I call your attention to the top of page 34 of the deposition of Mr. Darr to a letter from Mr. Roe in which he said: "I am attaching hereto a letter just received from Mr. Donnelly which is self explanatory, together with clipping relative to Mr. Hair's accident in Pocatello." You sent Mr. Roe the letter together with the [299] clipping from the newspaper, referring to the accident?

Mr. Merrill: The same objection.

The Court: The same ruling.

(Testimony of L. R. Donnelly.)

A. I did.

Q. Calling your attention to page 32 of the deposition of Mr. Darr. In the first paragraph of that letter you state: "Inclosed find newspaper clipping that was cut from local paper."

Mr. Merrill: The same objection as previously made.

The Court: The same ruling.

A. I said that, yes.

Q. That was from the local, the Pocatello Tribune.

A. I cannot say which paper but it was a newspaper.

Q. The paper published in Pocatello?

A. I obtained it here in Pocatello.

Q. You read the newspaper reports of this Myers' accident?

A. I read them after I made the investigation.

Q. In the letter you said that you knew that the clipping was all wrong because you had investigated the accident. A. That is correct.

Q. And that is what you wrote?

A. Yes, sir.

Q. You read all the newspaper reports of the accident at that time?

A. I read some of them. [300]

Q. You were making a complete investigation to find out what the facts were?

A. Yes, that's right.

Q. You looked the matter up and tried to find out all the information you could?

(Testimony of L. R. Donnelly.)

A. Yes, sir.

Q. Tried to get all the information with reference to whether this man Hair hauled guests?

A. Yes, sir.

Q. Went to the Police station and demanded possession of your car?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Yes, sir.

Q. And in your letter you stated that you went over and got tough with the Police Department and pulled a bluff on them.

Mr. Merrill: Objected to as the letter is the best evidence, and it is irrelevant for any purpose.

The Court: He may answer.

A. I tried to obtain the release of the car.

Q. Who did you talk to over at the police station?

A. I imagine it was the sergeant,—the man in charge.

Q. Did you ever see Mr. Pugmire, the chief of police? [301]

A. I have seen him.

Q. Did you talk to him at that time?

A. I don't remember.

Q. Didn't you ask Pugmire to give you the release of the automobile?

A. I asked someone, I don't know who it was.

Q. Did you say that you did or didn't talk to Chief Pugmire?

A. I don't remember.

Q. You knew Mr. Pugmire?

A. Yes, sir.

(Testimony of L. R. Donnelly.)

Q. Didn't tell you at that time,—you did say that you saw him? A. I have seen him, yes.

Q. Didn't Chief Pugmire tell you at that time that Mr. Hair was under the influence of intoxicating liquor when he struck Mr. Myers?

A. He did not.

Q. Didn't he tell you that Mr. Eckersley who was with him was also under the influence of liquor?

Mr. Merrill: We object to this testimony; it is entirely immaterial for any purpose in this case, and it is prejudicial.

The Court: He may answer.

A. No, sir.

Q. Didn't he tell you that he found intoxicating liquor in [302] the truck belonging to the Reynolds Tobacco Company?

A. Yes, he told me that. I will not say that it was Mr. Pugmire who told me, but it was some officer.

Q. You found out at the police station that they found intoxicating liquor in the car belonging to the Reynolds Tobacco Company?

A. That's right.

Q. You didn't tell Mr. Darr that in your report to him.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I don't recall.

(Testimony of L. R. Donnelly.)

Q. You found out that Mr. Eckersley was a passenger in that car, didn't you?

A. Yes, sir.

Q. And you didn't report that to the Company?

A. Not in this letter, no sir, I didn't.

Q. Then you did report to the Company later that Mr. Eckersley was a passenger in this car?

A. I reported it to Mr. Roe.

Q. You knew that Mr. Eckersley was a passenger in the car with Hair at the time you wrote this first letter?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. And Mr. Donnelly, you also knew that he wasn't going from [303] the station, and that statement wasn't true?

A. I reported that I found in the investigation, what I thought was the truth.

Q. Didn't you find out that he didn't take his wife to the station at four o'clock in the morning but that he had Mr. Eckersley with him and that they had been out to the El Rio club?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not within the issues.

The Court: He may answer.

A. Later on I found that he was in the car.

Q. Did you report that to your superior?

A. I reported it to Mr. Roe.

Q. You found from the newspaper that it was claimed that Mr. Eckersley, who was with him, was intoxicated?

(Testimony of L. R. Donnelly.)

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I don't remember what was in that clipping.

Q. You sent that clipping to Mr. Roe, didn't you? A. I sent a clipping to him.

Q. Now, Mr. Donnelly, referring to exhibit 23, Plaintiffs' exhibit 23, I will ask you to look at it. That is the newspaper report that you sent the clipping from, which was sent to Mr. Roe?

A. I wouldn't say. [304]

Q. Read it and see if it is the one you sent to him. Just read it to yourself.

A. It is a clipping, but I wouldn't say it was the clipping that I sent to Mr. Roe.

Q. You know, as a matter of fact, that is the clipping you sent. The one you sent when you said "you will note how the papers are playing this up". A. I do not know that.

Q. Did you read that when you were in Pocatello? A. I don't know that I did.

Q. Did you read similar accounts?

A. I read accounts of it.

Q. Did you read that or not, Mr. Donnelly?

A. I wouldn't say.

Q. You were reading newspaper accounts to get such information as you could, were you not?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

(Testimony of L. R. Donnelly.)

A. Yes, I read the accounts but I had made an investigation before it was published.

Q. You read this newspaper article?

A. I read newspaper articles.

Q. You read the newspaper article which has been shown you when you were here in Pocatello?

A. I read several, I wouldn't say I read this one. [305]

Q. You were reading all of them to find out what you could?

A. I wasn't buying all the newspapers. If they happened to be in the newspaper that I bought I read it.

Q. What is the date of the exhibit?

A. April 16, 1939.

Q. I call your attention to the letter dated April 17, 1939 and ask you if that refreshes your recollection any on this matter? A. No, sir.

Q. You were in Pocatello on April 16th?

A. Yes, sir.

Q. You know that you were here on the 16th?

A. I don't know whether I was here on the 16th or the 17th.

Q. Do you know how many papers are published in Pocatello? A. No.

Mr. Davis: I offer in evidence exhibit marked Plaintiffs' exhibit 23, that part of the exhibit which refers to the accident with reference to Jacob Myers. We offer it upon two theories: First, that the evidence is sufficient to justify its introduction on the theory that he sent this clipping at that

(Testimony of L. R. Donnelly.)

time, and, second, that it was in a newspaper of general circulation and that he was sent here for the purpose of making an investigation and that he is charged with knowledge of matter that therein appear. [306]

Mr. Merrill: That is objected to as not being competent evidence showing that this was the clipping which was inclosed in the letter. If they wanted that information why didn't they ask Mr. Darr? He could have supplied the clipping. The Court will take judicial notice that there are papers circulated in Pocatello other than the Pocatello Tribune, especially the Salt Lake Tribune which has as great a circulation as the Pocatello paper. Without proof of the fact that the clipping was sent it would not be proper to admit such evidence as this.

We object on the ground that it is incompetent, irrelevant and immaterial and prejudicial. It has not been properly identified.

The Court: There is a strong presumption that this is the article, or an article which Mr. Donnelly has read. Whether it was the article that he sent in the letter or not, there is no direct proof, but there is also a strong presumption that it was the article attached to the letter. I will reserve ruling on that for the present.

Q. You did not expect to be shown that newspaper with that article in at this time, did you?

A. I ask to see it again, please.

(Testimony of L. R. Donnelly.)

Q. Certainly. You didn't expect me to produce it at this time, did you? [307]

A. No, I didn't expect it, but——

Mr. Merrill: Objected to as incompetent, immaterial and irrelevant.

The Court: He has answered, it may stand.

A. Nothing surprises me.

Q. Nothing surprises you?

A. That's right.

Q. You are fearful of admitting here that you read that newspaper article, aren't you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and argumentative.

The Court: He may answer.

A. I am not fearful. I don't want to admit something that I didn't send in.

Q. Regardless of sending it in. You know that you never came here to Pocatello to make that complete investigation without reading these various articles that were published about it.

Mr. Merrill: We object to that as being argumentative.

The Court: He may answer.

A. Yes, I have said that I read several articles.

Q. You know that you read that article in that paper?

A. No, I don't know that I read this. I don't know whether I read this or not. [308]

Q. Did you read it carefully just now?

A. Yes, sir.

(Testimony of L. R. Donnelly.)

Q. Did you read other articles that had the same information and the same claims in them?

A. Well, I read several.

Q. Did you read other newspaper articles that contained the same thing that is in that article?

A. I read several newspapers, yes, sir.

Q. What did you mean when you told your superior that the newspapers were trying to play up this accident? Explain what was in that clipping you sent that indicated that they were trying to play up the accident.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, argumentative and not proper cross examination.

The Court: He may answer.

A. I don't remember.

Q. You don't remember that? A. No, sir.

Q. In the clipping that you sent did it contain a statement the same as the article you read here where the police claimed that this man was driving while intoxicated and that he was held on a drunken driving charge and that he was going to be arrested for manslaughter?

Mr. Merrill: Objected to as incompetent, [309] irrelevant and immaterial and not the best evidence.

The Court: I suppose the newspaper clipping which was sent by Mr. Donnelly would be in the possession of the defendants. He may answer.

A. It evidently gave an account of the accident which I didn't agree with.

(Testimony of L. R. Donnelly.)

Q. But you did know that there were claims in that article with which you didn't agree?

Mr. Merrill: Objected to as argumentative and repetition.

The Court: He may answer.

A. I mean by that, that from the investigation I made I found things that didn't agree with their article.

Q. You knew that it was claimed by the police that he was drunk while he was driving the car?

A. I didn't know that.

Mr. Merrill: We make the same objection to that question.

The Court: It has been answered and the answer may stand.

Q. You attended the trial in the District Court where Mr. Hair was tried under the indictment?

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial and on the grounds that we have discussed here before. It is prejudicial and it is entirely [310] immaterial and irrelevant to any of the issues here.

The Court: That would be true if it is not connected up, but at this time I will let him answer.

A. I attended part of the trial of Mr. Hair.

Q. You attended part of the trial?

A. Yes, sir.

Q. Did you attend at the time,—strike that, please,—do you recall being in the Court room when Mr. Pugmire, the chief of police, testified. In the District Court here in Pocatello?

(Testimony of L. R. Donnelly.)

A. I think I was there.

Q. You heard Mr. Pugmire testify at that time that he took whiskey out of the Reynolds Tobacco Company truck that Mr. Hair was driving when Mr. Myers was killed?

Mr. Merrill: Objected to as not the best evidence of what Mr. Pugmire testified.

The Court: He may answer.

A. Yes, sir.

Q. You heard Mr. Pugmire testify that Mr. Hair was under the influence of intoxicating liquor and had been drinking when he struck Mr. Myers, didn't you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not the best evidence of what the testimony was. It is also prejudicial.

The Court: He may answer. [311]

A. Yes, sir.

Q. And you heard him testify that Mr. Eckersley who was in the car with Mr. Hair had been drinking?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not the best evidence.

The Court: He may answer.

A. Can I make this statement? I was there when Mr. Pugmire was on the witness stand and I don't recall now what the questions about Eckersley were and what his answers were.

Q. You didn't report to Mr. Darr any of these facts and did not report that you heard the testimony that this man drove your car or truck while

(Testimony of L. R. Donnelly.)

he was drunk and while he was drinking intoxicating liquor?

Mr. Merrill: The same objection.

The Court: He may answer.

A. I believe he did.

Q. Mr. Donnelly, my question was: you didn't report what you heard the Police state.

A. I reported to Mr. Roe, my superior.

Q. Did you report to Mr. Roe, that Mr. Pugmire, the Chief of Police, had testified that this man was under the influence of intoxicating liquor when he struck Mr. Myers?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not the best evidence. [312]

The Court: He may answer.

A. I told him what I heard at the trial.

Q. You told him what you heard them testify to?

A. Yes, sir.

Q. That Mr. Eckersley was drinking.

A. I remember——

Mr. Merrill: Just a minute. We object to that on the same grounds.

The Court: He may answer.

A. I remember telling him that Mr. Eckersley was with Mr. Hair at the time.

Q. You told them they had liquor in the truck and that the officers found it?

Mr. Merrill: We make the same objection on the same grounds as heretofore stated.

The Court: Overruled, he may answer.

A. Yes, sir.

(Testimony of L. R. Donnelly.)

Q. Do you recall when the trial was?

A. No.

Q. Would it refresh your memory if I said that it was in December, 1939?

A. Yes, that is right.

Q. After you called that to Mr. Roe's attention, Mr. Hair continued to drive the Company truck?

A. Yes, sir. [313]

Mr. Davis: That is all at this time, if the Court was going to adjourn at this time, however, I will want to continue the examination in the morning.

The Court: Yes, we will recess at this time until 10 in the morning. You will meet the Court at 10 tomorrow morning.

March 21, 1945, 10 O'clock

The Court: I will sustain the objection to the admission of the newspaper clipping with the understanding that it might be reoffered later.

Q. Now, Mr. Donnelly, again calling your attention to your letter and report. Would you like to have the deposition with you so that you may be advised if the questions are asked correctly?

A. Yes, I think so.

Q. On page 32 of the deposition I call your attention to the statement there, "I investigated the accident myself." Now, who did you talk to and who did you go to see in your investigation?

Mr. Merrill: Objected to as immaterial. We are not trying that case here. The only possible theory is that they had knowledge of this one infrac-

(Testimony of L. R. Donnelly.)

tion. That is the only possible reason that the evidence could be suggested.

The Court: Overruled. [314]

A. The parties that I called during the investigation as near as I can remember about six years ago, is that I first went to the Police Station and I got their version of the accident, and then I called on our jobbers, our dealers and his landlord and his personal acquaintances and anybody that seemed to know anything about the accident.

Q. You were trying to get any information you could from any source? A. Yes, sir.

Q. When you called on the Police and got their version; the version they gave you was that Mr. Hair was intoxicated when he killed Mr. Myers?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. I called on the physician who examined Mr. Hair shortly after the accident and he emphatically said that Mr. Hair was not intoxicated.

Q. What physician was that?

A. Dr. Hughart, I think.

Q. Did you hear Doctor Hughart testify in that case? A. Yes, sir.

Q. He was not a policeman? A. No, sir.

Q. When you got the Police version, it was that the man was [315] intoxicated when he had the accident? A. No, sir, they did not.

Q. What did they tell you?

A. They told me of the accident and what they

(Testimony of L. R. Donnelly.)

found, where the accident happened. I don't recall anybody giving his opinion as to the condition of Mr. Hair outside of the physician.

Q. Who did you talk to at the Police station?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purposes, it is repetition and doesn't tend to prove any issue in this case.

The Court: He may answer.

A. I talked to the physician mostly and to some policeman, I think it was the sergeant.

Q. Was it the desk sergeant?

A. I cannot say.

Q. Did you write his name down?

A. No, sir.

Q. Did you take any notes in making this investigation? A. Several notes, yes, sir.

Q. Whoever was the desk sergeant on April 15, 1939, that was the man you talked to?

A. Whoever was at the police station.

Q. What time of day was it?

A. I don't remember. [316]

Q. Did you talk to Mr. Pugmire, the Police Chief, that day?

Mr. Merrill: May I have my objection to this?

The Court: Yes, and I will make the same ruling. I think, Mr. Merrill, it would be better to make the objections.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

(Testimony of L. R. Donnelly.)

A. It is possible that I talked to Pugmire if he was there. I don't recall who was there.

Q. Can you tell whether you talked to the Chief of Police, Mr. Pugmire?

A. I don't remember.

Q. You don't remember?

A. No, sir, I don't remember.

Q. Now, Mr. Donnelly, I call your attention to this statement in your letter at the bottom of the page: "The police had the Company car parked on the street so everyone could look at it,—strike that—"The police had the Company car parked on the street so everyone could see it and cause public sentiment against Mr. Hair to strengthen their case." Why did you make that statement?

Mr. Merrill: Objected to as incompetent, [317] irrelevant and immaterial.

The Court: He may answer.

A. Because I believed it was true.

Q. What made you believe it was true?

A. I tried to get the car and at first I was refused; they refused to let me have it.

Q. Who refused to give it to you?

A. Whoever was at the police station.

Q. Was it this desk sergeant?

A. It must have been.

Q. Did he tell you why he refused?

A. He might, it is possible that he did but I don't remember.

Q. Now, Mr. Donnelly, I call your attention to the top of the next page: "When I got to Poca-

(Testimony of L. R. Donnelly.)

tello I tried to have the car released but they only got tough about it and . . .” Now, who was it that got tough about it?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose.

The Court: He may answer.

A. It was evidently the policeman at the police station.

Q. That is the desk sergeant?

A. I wouldn't say that, but whoever was there.

Q. Did you talk to more than one Policeman about it?

A. I probably could have talked to several.

Q. Isn't it a fact that they told you that the question of [318] the release was up to the Chief of Police and you would have to talk to him?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. No, sir.

Q. Your truck was filled with Company tobacco? A. That is correct.

Q. Had advertising matter of the Company?

A. Yes, sir.

Q. And bore advertising of the Company on the truck? A. Yes, sir.

Q. In your letter you stated that it was the cause of unjust advertising. A. Yes, sir.

Q. You considered that because of the advertising on the truck, advertising the Reynolds Tobacco Company?

(Testimony of L. R. Donnelly.)

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. There were more reasons.

Q. What were they?

A. There was quite a crowd there forming their opinion of the car when I went by.

Q. Did the car have printed on it, your name—that is, the [319] Reynolds Tobacco Company?

A. I don't believe so.

Q. Prince Albert Tobacco and Camel Cigarettes are products of the Reynolds Tobacco Company?

A. Yes, sir.

Q. Products they sell and advertise?

A. Yes, sir.

Q. You are familiar with the truck that Mr. Hair was driving when Mrs. Newby lost her life?

A. Yes, sir.

Q. And it had advertising on the side?

A. Yes, sir.

Q. Of Prince Albert Tobacco and Camel Cigarettes? A. That's right.

Q. That was for the purpose of advertising these products? A. Yes, sir.

Q. Mr. Hair carried advertisements of the Company and a part of his business was to advertise the products of the Reynolds Tobacco Company?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Yes, sir.

(Testimony of L. R. Donnelly.)

Q. Do you, or did you at that time, I mean now, in 1939 work [320] on a commission for the Company?

Mr. Merrill: Now that is entirely immaterial and we object on that ground.

The Court: I think he may answer.

A. No, sir.

Q. You wanted to keep Mr. Hair on because you considered him a good salesman?

A. Not wholly.

Mr. Merrill: That is objected to as incompetent and immaterial.

The Court: He may answer.

A. Not wholly.

Q. What was the other reason or reasons?

A. I didn't believe that he was trying to violate any of the rules of the Company, however, he did violate the rules by taking his wife to the train, but it was necessary for him to have transportation, and this accident happened on the return trip. After investigating the dealers and jobbers and looking into his work, I found that he was really doing a good job.

Q. Were those the only reasons?

A. Mainly.

Q. You stated before that the jury recommended leniency?

A. That was another reason. [321]

Q. You took that into consideration?

A. Yes.

(Testimony of L. R. Donnelly.)

Q. I mean, Mr. Donnelly, you took that into consideration when you gave him another chance?

A. That's right.

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial as to any issue here.

The Court: He has answered and the answer may stand.

Q. That was one of the reasons why you recommended that he be given another chance?

A. That was one of the reasons.

Q. Because the jury recommended leniency?

A. Extreme leniency.

Q. I call your attention to the fact that the case was never tried until December, 1939, and you made this recommendation in April, 1939, so that you couldn't have based it on the ground that the jury recommended leniency because Mr. Hair had not been convicted of any crime at that time.

A. No, he had not been convicted in April.

Q. So the jury had not recommended leniency?

A. Not at that time.

Q. So that was not one of the reasons that you recommended that he be given another chance?

Mr. Merrill: That is objected to as entirely immaterial.

The Court: He may answer.

A. That was one of the reasons.

Q. That was one of the reasons that you recommended that he be kept on.

A. He was never discharged.

(Testimony of L. R. Donnelly.)

Q. But the Jury had not recommended any leniency at that time? A. No.

Q. You didn't take that into consideration when you recommended it first?

A. When I first recommended it,—I didn't recommend it at that time because I didn't know.

Q. No, you didn't know. Now, you stayed in Pocatello during all of the trial of Mr. Hair in the State District Court?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I don't recall whether I was here for the entire trial.

Q. And were registered at the Bannock Hotel?

A. I think I was registered at the Whitman.

Q. Were you at Company expense when you attended that trial?

Mr. Merrill: Now that certainly is immaterial and we object on that ground.

The Court: He may answer. [323]

A. Yes, sir.

Q. You consulted with Mr. Hair's attorneys, Black and Black, at that time, during the trial?

Mr. Merrill: The same objection.

The Court: He may answer.

A. I talked to Black and Black.

Q. And was that when they talked over his defense?

Mr. Merrill: Objected to on the same grounds.

The Court: The same ruling.

(Testimony of L. R. Donnelly.)

A. Not that I recall now.

Q. You went back and forth with them and Mr. Hair to the Court house while it was being tried?

A. I did not.

Q. And were in their office many times when the case was being tried?

Mr. Merrill: I make the same objection that this is immaterial.

The Court: He may answer.

A. In whose office?

Q. Black and Black's office.

A. Yes, sir, several times making my investigation.

Q. And talking about this case?

A. Possibly, yes.

Q. And after the jury brought in their verdict did you go to [324] the District Judge concerning leniency for this man Hair?

Mr. Merrill: We object on the ground that it is immaterial.

The Court: He may answer.

A. I did not.

Q. Did you ever talk to Judge Downing about it?

Mr. Merrill: Objected to as incompetent and entirely immaterial to any issue in this case.

The Court: He may answer.

A. I don't remember.

Q. When you were here at that trial and after it was over, you reported the fact to Mr. Roe, your superior, that Mr. Hair had been convicted, didn't you?

(Testimony of L. R. Donnelly.)

Mr. Merrill: Objected to on the same grounds.

The Court: The same ruling.

A. I reported and he also made an investigation.

Q. While you were here attending that trial and talking to Black and Black and also to Hair, you know at that time, and you found out at that time that Mr. Hair had trouble in driving at Dubois, Idaho, didn't you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial to any issue, and prejudicial.

The Court: He may answer.

A. I did not. [325]

Q. Where were you when this trouble occurred at Dubois?

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial. There is no evidence that there was any such occurrence.

The Court: I will sustain the objection at this time.

Q. Did you take any pictures of the right-of-way at the scene of the last accident?

A. I did not.

Q. Did you have any pictures taken there?

A. I did not.

Q. Did you make any investigation of the tracks at the scene of that accident?

A. I went out and tried to find the place but I couldn't find the place. The car had been removed.

Q. Who went with you? A. Myself.

Mr. Davis: I will ask the defendants to pro-

(Testimony of L. R. Donnelly.)

duce the newspaper clipping that was mailed to Mr. Roe. I will ask this witness.

Q. Mr. Donnelly, I will ask you to produce the newspaper clipping that was mailed by you to Mr. Roe.

Mr. Merrill: Now, that is objected to. It is apparent that no request has been made for its production [326] here. This newspaper clipping apparently is in North Carolina. The rules provide how he could have obtained it. They could have asked for it at the time of the examination of Mr. Darr. They could have asked during the last two years, or they could have asked Mr. Roe. Counsel knows that when a newspaper is mailed it is not in the possession of the one who mails it. The question is improper from any standpoint.

The Court: The witness may answer. He can tell whether he can produce it or not.

A. I am unable to produce it.

Mr. Davis: Now I ask defendants if they will produce it.

Mr. Merrill: We will be glad to do it, but it will probably take a week at least, but we will be glad to produce it.

The Court: You don't have it here?

Mr. Merrill: No, I never have seen it. The only information we have is what appears in that deposition, and that was taken in North Carolina.

The Court: Well, the matter seems to be settled for the present, if you haven't it, then, of course, you can't produce something you haven't.

(Testimony of L. R. Donnelly.)

Q. When Mr. Hair was given the truck, he was given blanks [327] upon which to make out reports in the event he had an accident?

A. That's right.

Q. Those are furnished by the Company and mailed out by the Company?

A. You say mailed out by the Company?

Q. Well, did you give them to Mr. Hair?

A. Could have been done either way.

Q. You are familiar with the two reports he made out, of the accident in which Mrs. Newby was fatally injured, either the same day or the next day?

A. Yes, sir.

Q. One was made in your presence, was it not?

A. Not in my presence.

Q. Well, you saw it? A. That's right.

Q. The instructions in one of your exhibits,—the instructions to the salesmen and to Mr. Hair, was that in the event of an accident to make those in triplicate and send one to the division manager.

A. To send all three to me.

Q. So you were familiar with one of the reports that he made out in Montpelier and which has been introduced in evidence here.

A. I am familiar with it. [328]

Q. And you were familiar with it in Montpelier at the time he made it out? A. Yes, I was.

Q. Now, Mr. Donnelly, what time during the day of April 15, 1939, was it that you went to the Police Station here? What time of the day was it that you went there?

(Testimony of L. R. Donnelly.)

Mr. Merrill: Objected to as immaterial. This has been asked and answered before and it seems he is just trying to catch this witness.

Mr. Davis: I am no such thing.

The Court: He may answer.

A. In April, 1939, that is six years ago.

Q. Sergeant Rush was on the desk from seven to three and Sergeant Thomas from three to eleven. Now, what time was it? Was it between seven and three or between three and eleven?

A. I wouldn't say.

Q. You don't know—you haven't any idea.

A. I don't have any idea.

Q. You don't know what time it was that you were there when this crowd was around this car?

A. It was several times during the day.

Q. Before noon or after noon?

A. I wouldn't say.

Q. You have no idea?

A. No, sir; I wouldn't say. [329]

Q. Was Grace, Idaho, in Mr. Hair's territory on September 11, 1942, or do you know that, Mr. Donnelly?

A. It was.

Q. And was Montpelier?

A. It was.

Q. Was Soda Springs?

A. Yes, sir.

Q. Was Pocatello?

A. It was, yes, sir.

Q. Did Mr. Hair have exclusive control and management of this truck, this panel truck?

A. No.

Q. Who else had any control of it?

(Testimony of L. R. Donnelly.)

A. I supervised the use of the truck, and the Company did.

Q. Were you supervising it when you were out of the State?

A. He has his instructions how to handle it.

Q. He had control as far as to what time he had to drive it, when he drove it and where?

A. He had his instructions how to handle the truck and he was supposed to follow the instructions.

Q. Was anybody there to see that he followed the instructions? A. No, sir.

Q. Nobody to personally supervise the use of it except Mr. Hair? A. No, sir.

Q. He could go and get the car and take it any time he pleased? A. Yes, sir. [330]

Q. He had charge of having it oiled and greased and taking care of it?

A. He did.

Q. Keeping it washed and in good condition?

A. Yes, sir.

Q. What was his instructions as to keeping it clean and in good condition so that it would be good advertising for the company?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. He was told to keep it in good shape, not for advertising, but so the car was in good condition.

Q. What about keeping it clean and washed?

(Testimony of L. R. Donnelly.)

A. He was instructed not to have the car washed over once a month.

Q. You instructed him on that?

A. Yes, sir.

Q. Did he carry tobacco and other company products in the truck? A. Yes, sir.

Q. And advertising matter, he carried that in it also? A. Yes, sir.

Q. You stated a minute ago that one of the reasons that you [331] recommended that Mr. Hair be continued on his job was that he was taking his wife to the depot and returning from that trip he had this accident?

A. He said he violated the rule, but that was his reason for using the car.

Q. But you found out that he had Mr. Eckersley with him and that he hadn't come from the depot, but from the El Rio night club.

A. I did not.

Q. Didn't you make inquiry as to where he was coming from? A. I talked to them.

Q. And they told you Mr. Eckersley was with him?

A. Yes, they informed me that the man was with him.

Q. And you tried to conceal that from your superior?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

The Court: He may answer.

(Testimony of L. R. Donnelly.)

A. I didn't think it was necessary.

Q. You didn't think it was necessary to tell your superior?
A. No, sir.

Q. When Mr. Darr consented that this man be kept you never had told him that Mr. Eckersley was with him in the car, had you, Mr. Donnelly?

A. I have told my superior officer.

Q. You told Mr. Roe that Mr. Eckersley was in the car? [332]

A. That is who I was to report to.

Q. You didn't tell him in the written report?

A. I didn't know it then.

Q. Do you go over your territory,—your salesmen's territory?
A. Yes, sir.

Q. Frequently?

A. As frequently as I could.

Q. How often during 1939, 1940 and 1941 did you come to Mr. Hair's territory?

A. About once a month.

Q. Did you go over the territory?

A. Whenever he happened to be so I could.

Q. Where did you go?

A. Wherever he happened to be.

Q. Would you see him at different places in the territory?

A. Mostly in Pocatello, his headquarters.

Q. Did you ever see him at Pond's?

A. I don't recall where Pond's is.

Q. It is a resort between Ashton and West Yellowstone.

A. It is possible that I saw him there.

(Testimony of L. R. Donnelly.)

Q. Was his wife with him then?

A. I don't think he had his wife with him.

Q. Did you have your wife with you?

A. On a vacation. [333]

Q. Did Mr. Hair have his wife?

A. Yes, sir.

Q. In the company truck? A. No, sir.

Q. Did you ever see Mr. Hair there with the company truck? A. No, sir.

Q. Did you ever see him at any resort around Ashton with the truck? A. No, sir.

Q. You and your wife and Mr. Hair and his wife spent your vacation at Ponds?

A. Yes, that's right.

Q. Were you at his home in Pocatello at any time? A. Yes, I have been there.

Q. Did you ever have any meals there?

A. I have had meals there, yes.

Q. After this Myers accident you took Mr. Hair to the hotel where you and Mr. Roe and Mrs. Hair were all there together? A. Yes, sir.

Q. You made it clear to Mr. Hair at that time that if he ever hauled his wife or anyone else in that truck that he would be immediately discharged?

A. That's right.

Q. Mrs. Hair wanted to help him? [334]

A. That's right.

Q. Mrs. Hair knew that if she ever rode in that truck again he would be discharged?

A. Yes, sir.

Q. You knew that Mr. Hair used his truck to call

(Testimony of L. R. Donnelly.)

on people who handled your products and who operated night clubs and taverns and places of that kind?

A. Yes, sir.

Q. You knew that it was necessary to call on these people at night sometimes?

A. No, sir.

Q. Were his instructions given as to the time he was to use the truck? A. Yes, sir.

Q. And what were his instructions as to the time he was to use the company truck?

A. He was to have the truck in the garage at sundown.

Q. He could use it at 4:15, 4:30 and 5 o'clock in the daytime? A. On company business.

Q. Now, Mr. Donnelly, you recall seeing Mr. Newby and his brother-in-law after this accident?

A. Yes, sir.

Q. Is it a fact that you were concerned about what kind of a doctor they had. Whether they had a good doctor?

Mr. Merrill: Objected to as not proper cross-[335] examination. It would be all right after we put him on as our witness.

The Court: I think he can cross examine him on this. He may answer.

A. I was concerned with whether they had a doctor.

Q. Were you going to get another doctor if you thought the one they had wasn't giving proper treatment? A. No, sir.

(Testimony of L. R. Donnelly.)

Q. What remark did you make about a passenger in Mr. Hair's car, at that time? What did you say?

A. I made the remark,—I asked Hair, "my God did you have a passenger?"

Q. Didn't you say: "My God did you have another passenger?"

A. Not at that time.

Q. Didn't you testify before that you said "My God did you have another passenger?"

A. I testified "My God did you have a passenger," and "Another passenger" later on.

Q. You testified that you said "My God did you have another passenger?"

A. Yes, sir.

Q. Were you the owner of the truck that Mr. Hair was driving at the time of this last accident?

A. No.

Q. You permitted Mr. Hair to sign your name in the application [336] for license and to name you as the owner?

A. It was a matter of convenience; the cars were all in my name.

Q. You permitted Mr. Hair to sign your name to the application and represent you as the owner of the truck?

Mr. Merrill: Objected to as immaterial for any purpose.

The Court: He may answer.

A. Yes, sir.

Q. You knew that it wasn't your car when you permitted that?

Mr. Merrill: Objected to as immaterial.

(Testimony of L. R. Donnelly.)

The Court: He may answer.

A. It wasn't my car.

Q. One of the reasons was that you wanted it to appear as your car and then in case of an accident you could say that it wasn't your car, but the company car?

Mr. Merrill: Objected to as immaterial and irrelevant for any purpose.

The Court: He may answer.

A. No.

Mr. Davis I think that is all at this time.

Redirect Examination

By Mr. Smith:

Q. Mr. Donnelly, in reference to the title to the automobile, as to it being in your name, explain the reason for that. [337]

A. Well, it is for convenience sake in the matter of obtaining the license in obtaining license for a good many cars, it cannot be taken care of in Winston-Salem, North Carolina. It is a good deal more convenient.

Q. Is that true over the district over which you have charge?

A. Yes, sir, it was true in my district.

Q. State whether or not that was true of every automobile driven by every salesman in your territory?

A. Yes, it was.

Q Now, Mr. Donnelly at the time of the trial

(Testimony of L. R. Donnelly.)

with reference to the Myers incident in Pocatello, you heard some of the witnesses testify?

A. Yes, sir, I heard several witnesses testify.

Q. You recall that you were asked whether you heard one Pugmire testify? A. Yes, sir.

Q. Now, with reference to the question asked you as to whether or not you heard the witness Pugmire testify that liquor was found in Hair's car. Did you hear anyone testify at that time in explanation of that fact? A. Yes, sir.

Q. If so state the facts.

A. I heard several witnesses testify at the trial. I heard the doctor testify, I remember that, and I think Mr. Pugmire [338] testified and I think Mr. Eckersley testified.

Q. What did Mr. Eckersley say with reference to the liquor found in the car?

A. Mr. Eckersley said that there was a bottle of liquor that was found in the car, and that it belonged to him

Q. Now Mr. Donnelly, when did you go to Montpelier with reference to the Newby accident?

A. It was on the 12th of September.

Q. I beg your pardon?

A. It was on the 12th of September.

Q. State what you did when you got there?

A. First of all I went to the Burgoyne cabins where Mr. Hair was staying and got his version of the accident, then I drove my car to the Ford Garage where the wrecked car was, and from the garage after looking over the wrecked car, I went to the

(Testimony of L. R. Donnelly.)

police station. At the police station I was informed that the sheriff who made the investigation was not there and that the police captain, or the chief of police who was there didn't know anything about the accident; then I went back to the garage and made a more thorough inspection of the car and transferred the tobacco from the wrecked car into the car I had with me. Then I went up to the cabin camp and made arrangement to stay that evening.

Q. That was Saturday evening?

A. Yes, sir. [339]

Q. Up to that time had Mr. Hair handed in any report in connection with or relative to the accident?

A. I inquired if he had made out an accident report and he said he had and mailed it in.

Q. Did he hand you a report at that time or had it been sent? A. He had mailed it in.

Q. Was the second report made at that time while you were there at Montpelier, or had that been made and sent in?

A. No, it was made after I found out there was a passenger in the car, and that the first report was not a correct report.

Q. What was the extent of your examination of the damaged automobile which Mr. Hair had been driving?

A. I found that the body was badly damaged I would say almost total damage to the body; the right front tire had been blown out, in fact there wasn't much left but to salvage it.

Q. Where do you live Mr. Donnelly?

(Testimony of L. R. Donnelly.)

A. Now?

Q. Yes. A. Salt Lake City, Utah.

Q. Was that your home in April, 1939?

A. Yes, sir.

Q. How long had you lived there before that time?

A. I had lived in Salt Lake City for seven years.

Q. Did you ever live in Pocatello?

A. No, sir.

Q. What paper do you generally take at your home,—what newspaper do you take?

A. The Salt Lake Tribune and the Salt Lake Telegram.

Q. With reference to the newspaper item which you have been questioned about by Mr. Davis, do you have any distinct recollection at this time what paper or clipping you sent to the Reynolds Tobacco Company?

Q. I don't have any recollection of what clipping it was that I sent in, no sir.

Q. Or from what paper it was?

A. No, sir.

Q. Whether it was a Salt Lake paper or what?

A. I rather imagine it would be the Tribune.

Q. Which Tribune?

A. The morning Tribune here in Pocatello.

Q. Which Tribune?

A. The Salt Lake Tribune.

Q. But you have no independent recollection which paper it might have been at this time?

A. I wouldn't have any recollection other than that was what I was in the habit of buying.

(Testimony of L. R. Donnelly.)

Q. When was this conference that you testified about on cross- [341] examination which you had with Mr. Hair at which time you continued him in the company's employ. I am speaking now of the time after the Myers incident.

A. The conference took place at the Whitman hotel?

Q. With reference to April 16, 1939, how long a time after that was it, approximately?

A. Well, it was after I had completed my investigation, and after Mr. Roe had arrived here in Pocatello. I don't know what date it was.

Q. It was a relatively short time after the Myers incident?

A. Yes, a short time after.

Q. At that time had you had the interview with the doctor which you testified concerning,—the interview as to whether or not Hair was intoxicated on April 16, 1939?

A. It was, yes, sir.

Q. Now, going back to the report which you sent back to the company. The information you obtained from the doctor relative to Hair's condition, did that have any influence on some of the statements you made in the report to the company?

A. Yes, sir.

Q. Did you believe the doctor, or someone who indicated to you—the police officers who indicated to you that Hair had been intoxicated? [342]

A. I believed the doctor who made the investigation and examination.

(Testimony of L. R. Donnelly.)

Q. Have you any specific authority to hire or do away with the service of a salesman?

A. I have authority to discharge salesmen, but no authority to hire salesmen.

Q. At this conference which was at the Witman Hotel shortly after the Myers incident I tink you stated that yourself, Mr. Roe, Mrs. Hair and Mr. Hair were present.

A. That's right.

Q. What position does Mr. Roe occupy with reference to the company?

A. Department manager.

Q. Where is his headquarters?

A. At that time in Denver, Colorado.

Q. What transpired at that conference with specific reference to Mr. Hair continuing with the company and what he would have to do and observe if he continued with the company?

A. Mr. Roe and myself sat Mr. Hair and his wife down in the lobby of the second floor of the Whitman Hotel and we read the instructions to him and asked if he understood each instruction and he said that he did and we asked him if he ever intended to carry any more passengers in the car and he flatly said he would never carry another passenger, including his wife. We made it clear that any more infractions of the company rules and he would be immediately discharged. We asked him if he understood that and he said that he did. We asked his wife, also, and she said she did. We also went into

(Testimony of L. R. Donnelly.)

the company rules on how to maintain and operate the car and we made sure that he understood each rule. He flatly said he would never carry any passengers or violate any company rule of any kind.

Q. State whether or not any of the company rules relative to carrying passengers were ever violated by Mr. Hair from April, 1939, until September 11, 1942? A. Not to my knowledge.

The Court: We will take a recess for ten minutes.

11:05 A. M., March 21, 1945.

Q. A few minutes ago you were interrogated by Mr. Davis concerning a time you were at a resort at Pond's at which time Mr. Hair and his wife were there. Was there anyone else there at that time, any employee of the Reynolds Tobacco Company?

A. Yes, sir.

Q. Who?

A. There was another salesman by the name of Hamer there at that time.

Q. What time of the year was that? [344]

A. That was in July, during our vacation.

Q. Do you know what year that was?

A. I don't recall.

Q. Was it after the Myers incident or before?

A. It could have been either.

Q. Whose car did Hair have at that time?

A. His passenger car.

Q. Relate or give the reasons, or relate the circumstances of how it came to your attention that he was driving his own car.

(Testimony of L. R. Donnelly.)

A. We made arrangements to spend our vacations together. This other salesman, Mr. Hamer, located at Salt Lake City, and his wife, myself and my wife and my youngster and Mr. Hair and his wife. I drove my personal car from Salt Lake City to Pocatello with my wife, Mr. Hamer and his wife and my youngster. We met Mr. Hair there and we drove from Pocatello to Pond's Lodge, Mr. Hair drove his personal car and I drove my personal car. We spent some time at Pond's, did a little fishing and then drove to Yellowstone Park.

Q. For how long a period were you together?

A. We generally have nine or ten days' vacation.

Q. You had an opportunity to observe the car that Hair was driving? A. Yes, sir.

Q. Was there any other occasion when you were on a vacation [345] and Hair was on a vacation when you and Hair were together?

A. Not that I remember.

Q. That was the only time?

A. Yes, sir.

Mr. Smith: That will be all at this time, however we will want to recall Mr. Donnelly as our own witness.

Recross Examination

By Mr. Davis:

Q. Now, Mr. Donnelly, you had a talk with Hair,—you and Mr. Roe,—in which you went all over the company instructions and told Hair it was against the rules to haul guests. A. That's right.

(Testimony of L. R. Donnelly.)

Q. And you went all over them with him when you delivered the car to him in 1937?

A. He signed the agreement.

Q. Yes, and he had already signed one agreement not to haul any guests? A. Yes, sir.

Q. You knew that he violated that?

A. That's right.

Q. He signed a statement, one of your exhibits, that he understood all those rules in 1937?

A. Yes, he signed one. [346]

Q. And having violated them once, you didn't think he would violate them again?

A. I didn't think he would violate them again.

Q. Mr. Eckersley claimed the bottle of whiskey that was in your truck in April, 1939, was his whiskey? A. That's right.

Q. And you believed that?

A. I believed it.

Q. Did Mr. Hair have any right to allow Eckersley to haul whiskey in your truck?

A. Not at all.

Q. You say you buy the Salt Lake Tribune?

A. Yes, sir.

Q. Do you buy it each day or take it at home?

A. I take it at home and buy it.

Q. You stated in answer to counsel's question that you buy the Pocatello Tribune when you went to Pocatello?

Mr. Smith: That is objected to that is not the witnesses' testimony.

(Testimony of L. R. Donnelly.)

Mr. Davis: Then I am mistaken, I will withdraw the question.

Q. Did you buy the Pocatello Tribune in Pocatello? A. I try to buy the home paper.

Q. Did you buy the Pocatello paper when you were investigating this Myers accident? [347]

A. I might have. I don't remember.

Q. You wouldn't come to Pocatello and investigate a Pocatello accident and buy a Salt Lake City paper would you?

A. If it had an article in it I would.

Q. Did you buy the local paper Mr. Donnelly?

A. I don't remember.

Q. What did you mean when you told Mr. Roe that you were sending a clipping from the local paper? A. That I bought it locally.

Q. You bought it in Salt Lake City, did you.

A. I bought it in Pocatello.

Q. And which paper was it you bought?

A. I don't remember.

Q. Did you read the local paper, the Pocatello paper about the Myers accident?

A. I read whatever paper had the article in that I was reading.

Q. You know that you wanted to look into the matter and find out what was claimed, and you know that you read the Pocatello paper do you not?

A. Not after six years, I don't remember.

Q. Would you say that you didn't read the local paper? A. I don't remember.

(Testimony of L. R. Donnelly.)

Q. Don't you think in making your investigation that you would have read all the papers you could get that had articles about it? [348]

Mr. Merrill: That is objected to as repetition.

The Court: Yes, it may be, but I think he may answer.

A. I read several papers and I also made an investigation of my own which satisfied me of the condition of the accident.

Q. You read several papers in Pocatello. What papers could you get besides the Pocatello Tribune and the Salt Lake Tribune?

A. You could get any paper in the United States if you wanted to go after it.

Q. Do you think that they would have an account of the Myers accident in them?

A. I guess several would.

Q. Other papers throughout the United States?

A. I wouldn't know.

Q. When you got to Montpelier, you found that the first report that Mr. Hair made wasn't correct?

A. That's right.

Q. You suggested that he send in a corrected report?

A. I insisted that he send in a correct report.

Mr. Davis: That's all.

Mr. Smith: That's all.

R. M. PUGMIRE,

called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows: [349]

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. R. M. Pugmire.

Q. Where do you live?

A. Pocatello, Idaho.

Q. How long have you lived in Pocatello?

A. About forty years.

Q. What is your occupation?

A. Police officer.

Q. How long have you been a police officer?

A. About twenty-five years.

Q. Who are you at the present time employed by?

A. The city of Pocatello.

Q. How long have you been in the employ of the City of Pocatello, Mr. Pugmire?

A. Twenty-three years.

Q. What is your present position?

A. Chief of detectives.

Q. Have you ever held any other or superior position in the City of Pocatello?

A. I was Chief of Police.

Q. At what time were you Chief of Police of the City of Pocatello.

A. From 1936 until 1941. [350]

Q. You were Chief of Police on April 15, 1939?

A. Yes, sir.

(Testimony of R. M. Pugmire.)

Q. Do you remember what has been referred to here as the Myers accident? A. Yes, sir.

Q. Do you know Mr. Hair, who is in the Court room here? A. Yes, sir.

Q. Do you know Mr. Donnelly here (indicating)? A. Yes, sir.

Q. When did you first see Mr. Donnelly, if you remember?

A. I think it was a day or two after the Myers accident.

Q. Where did you see him?

A. At the Police Station.

Q. Did you have a conversation with him at that time? A. Yes, sir.

Q. That was at the Police Station in Pocatello?

A. Yes, sir.

Q. What did Mr. Donnelly say when he came to the Police Station?

Mr. Merrill: That is objected to as incompetent, irrelevant and immaterial for any purpose.

The Court: He may answer.

A. He wanted to know the circumstances of the accident and he wanted to know about the automobile we were holding.

Q. What did you tell him about the circumstances of the accident, at that time? [351]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose.

The Court: He may answer.

A. I am not sure that I can give you the conversation in detail, but I discussed quite thoroughly the circumstances of the case.

(Testimony of R. M. Pugmire.)

Q. What were the circumstances generally that you related?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. We are not trying the Myers case at this time. We are trying another matter entirely.

Mr. Davis: But we are trying the question of any notice that Mr. Donnelly or the Reynolds Tobacco Company might have had concerning Mr. Hair hauling guests in this car.

Mr. Merrill: But they have brought that out.

The Court: He may answer.

A. I advised Mr. Donnelly about the accident. The time and the place, the driver of the automobile and the passenger in the car and what we intended to do with the automobile.

Q. Anything else?

A. Yes, and what our intention was in respect to the driver.

Q. Did you advise him with reference to anything found in the truck and the condition of the driver and the passenger in the truck?

Mr. Merrill: Objected to as incompetent, [352] irrelevant and immaterial.

The Court: He may answer.

A. Yes, sir.

Q. What did you advise him?

Mr. Merrill: Now, we make the same objection to this question.

The Court: He may answer.

(Testimony of R. M. Pugmire.)

A. I advised Mr. Donnelly that Mr. Hair was under the influence of intoxicating liquor.

Mr. Merrill: I move to strike that, no foundation has been laid for it and it is incompetent, irrelevant and immaterial.

The Court: Possibly the foundation is not sufficiently laid, but it seems to me that he told the place and time and who was there, but perhaps you better clear that up.

Q. I think you stated that this was a day or two after the man Myers lost his life?

A. Yes, sir.

Q. Where was the conversation had?

A. At the Police station.

Q. And who was present?

A. Mr. Donnelly, myself and the Desk Sergeant.

Q. Do you remember who the desk sergeant was at that time? A. No, I don't remember. [353]

Q. Was it in the daytime—just fix the time as near as you can, Mr. Pugmire.

A. As I recall it was during the forenoon. I say that for the reason that we had just completed the photographing of the automobile which set in front of the police station, and we photographed it at that time because the sun condition was favorable and so I think it would be before noon of the day I talked to him.

Q. At that time what did you advise him as to the condition of the driver and the passenger and as to what you had found in the car?

Mr. Merrill: We object again that it is incom-

(Testimony of R. M. Pugmire.)

petent, irrelevant and immaterial and no proper foundation has been laid, and if it is asking an impeaching question it is not proper in form.

The Court: He may answer.

A. I am quite certain that I advised Mr. Donnelly that Mr. Hair was placed under arrest because of his condition; that he had been charged with operating an automobile while intoxicated, and that we had taken from the automobile several articles that we were holding as evidence, among them was a partially filled bottle of whiskey.

Q. Did you make any statement with reference to Eckersley at that time? A. I did. [354]

Q. What was that?

A. I told him that he had another young man in the automobile who was also intoxicated and that he had been charged with intoxication.

Q. At that conversation, Mr. Pugmire, was there anything said concerning the city being sued, or that you, as a police officer, were endeavoring to be tough or hard boiled?

Mr. Merrill: That is objected to as incompetent, irrelevant and immaterial and no proper foundation has been laid for such examination.

The Court: The objection is sustained.

Q. What else did Mr. Donnelly say to you. Did he make any demand or say what he would do to the City?

Mr. Merrill: That is objected to as being entirely incompetent, irrelevant and immaterial for any purpose.

(Testimony of R. M. Pugmire.)

The Court: I think all the conversation would be admissible, and he may give the conversation.

A. As I recall Mr. Donnelly's conduct there was very much of a gentleman. I don't recall any demand or request, except there was, I think, a request made to release the automobile, that he might take care of the property in it, and that he wanted to take the automobile and have it repaired.

Q. You were in Pocatello, as Chief of Police during 1939, 1940 and 1941? [355]

A. A part of 1941.

Q. You were here in 1939, 1940?

A. Yes, sir.

Q. And a part of 1941? A. Yes, sir.

Q. Where did you go in 1941?

A. With the F. B. I.

Q. How long were you with the F. B. I.?

Mr. Merrill: I don't see the materiality of this and will object on that ground.

The Court: He may answer.

A. About two and a half years.

Q. During that time where were you stationed?

A. I was stationed in several places.

Q. Were you at any time out of Pocatello?

A. Yes, sir; part of that time.

Q. Now, I will ask you,—strike that,—let me ask you if a part of the two and a half years with the F. B. I. was in Pocatello?

A. Yes, sir; I was stationed here part of that time.

Q. Now, Mr. Pugmire, I will ask you, did you

(Testimony of R. M. Pugmire.)

know the general reputation of Rulon D. Hair in the community in which he lived during 1939, 1940 and 1941 for being a drunken, reckless driver or a sober, careful driver? [356]

Mr. Merrill: That is objected to as being incompetent, irrelevant and immaterial and not having a proper foundation laid. He is not charged with being a drunken driver, there is no reference in the complaint to any such thing. The question is incompetent and not proper in this case and there is no foundation to permit the asking of it.

The Court: He may answer, yes or no, as to whether he knows.

A. Yes, sir.

Q. What is that reputation?

Mr. Merrill: Now, we make the same objection. There is no proper foundation laid for any such question and it does not deal with any issue in this case and it is prejudicial.

The Court: I think I will excuse the jury and hear you on this question.

(Whereupon, the jury was excused and counsel presented the matter to the Court.)

1:30 P. M., March 21, 1945

The Court: I think from my hurried examination of this matter that the objection should be sustained at the present time. I think the question, if asked, should follow the allegations of the complaint. [357]

Mr. Davis: Then I ask, Your Honor, that I be given permission, under the rules, to allege that they knew that Hair was a drunken, incompetent driver.

Mr. Merrill: And we certainly object to the amendment at this time. If it is allowed we will ask for a continuance to meet that. This has been through the Courts twice now and through the Circuit Court of Appeals once. We shall urge this objection.

The Court: The Court's thought was that in view of the fact that the complaint alleged that he was reckless and incompetent, that the question should be whether they knew his reputation as a reckless, incompetent driver. I cannot see where there could be any element of surprise to the defendants in amending the complaint to include this word 'drunken.' Certainly they should be able to meet this issue if they are prepared to meet the allegations now in the complaint, the allegation that he was reckless and incompetent. I am very doubtful that the amendment either strengthens or adds to the complaint.

Just how would you want to amend that, Mr. Davis?

Mr. Davis: We want to amend Paragraph seven to read: "That at all times herein mentioned defendant Rulon D. Hair had permission and authority from said Reynolds Tobacco Company and L. R. Donnelly to use [358] and operate said Chevrolet Panel truck upon the public Highways of the State of Idaho, notwithstanding that at all times

the said Reynolds Tobacco Company and Donnelly knew that said Hair was a careless, reckless, drunken driver of an automobile, and was in the habit of hauling guests in violation of instructions.”

Mr. Merrill: Our objection goes to the proposal as stated by counsel.

The Court: I think we will recess at this time for fifteen minutes. I want to look into this matter a little further.

2:20 P.M., March 21, 1945

The Court: Subdivision of Rule 15 of the rules of Civil Procedure provides in part: “If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence.”

In this case I cannot see, where the charge is already made that he was a reckless, incompetent driver,—I [359] cannot see where the defendants would be taken by surprise or injured in any way by the amendment. The amendment will be permitted and we will proceed.

The Court: The Bailiff will call the jury.

(Testimony of R. M. Pugmire.)

Mr. Merrill: May we have an exception to the ruling?

The Court: You may have your exception. I will say, too, that if counsel later wants to make another showing on this matter, I will hear you.

(Mr. Pugmire returned to the witness stand.)

Mr. Merrill: I want to add to the objection that this is not the proper method of trying to prove or of proving the allegation of the complaint.

The Court: I think he may answer the question. Do you remember the question, Mr. Witness?

A. Yes, I do. His reputation was that of a reckless——

The Court: He may say whether the reputation was good or bad as to the matters inquired about.

Q. Do you know his general reputation in the community in which he lived for being a drunken, reckless driver of automobiles or a careful, sober driver?

Mr. Davis: Now, I take it he is entitled to say whether it was one or the other.

The Court: If his reputation is bad it would [360] be that he is a reckless, careless and so on, driver, and if it was good then he would understand that he was a careful, sober driver, as I understand the question now.

Mr. Davis: If that is the understanding. I only want it clear that it is understood if he answers

(Testimony of R. M. Pugmire.)

that it is bad, that he is answering that he had such a reputation.

The Court: It may be so understood.

A. It was bad.

Mr. Davis: That is all.

Cross-Examination

By Mr. Merrill:

Q. When did you first become acquainted with Mr. Hair?

A. I have never been personally acquainted with him. I first knew Mr. Hair to say who he was, I would say probably in the fore part of 1939.

Q. That was when the Myers incident happened?

A. I would say some time prior to that, and about that time, yes, sir.

Q. Now, Mr. Pugmire, you say that Mr. Donnelly came to see you and that he was a perfect gentleman?

A. Yes, sir.

Q. He simply wanted information?

A. That is right.

Q. He discussed the matter calmly with you?

A. Yes, sir.

Q. There was no antagonism?

A. Not bad.

Q. You gave him the information?

A. Yes, sir.

Q. Do you know the name of the Doctor that examined Hair?

A. No, sir.

Q. Do you know that it was Doctor Hughart?

A. No, sir, I don't.

Q. You knew that a Doctor did examine him?

A. I understood that at the trial.

(Testimony of R. M. Pugmire.)

Q. Do you know who examined him?

A. No, sir, I don't.

Q. Did you call a Doctor?

A. I may have done.

Q. But you don't remember whether you did or not?

A. I wouldn't swear to it.

Q. If the Doctor testified, or found that Hair was not intoxicated, you would take his word for it?

Mr. Davis: Now, we will object to that as calling for a conclusion of this witness.

The Court: He may answer.

A. I think I should be guided by my own judgment.

Q. You saw Mr. Hair at that time for the first time?

A. I think I had seen him prior to that.

Q. Under what circumstances? [362]

A. When he was about his business.

Q. Driving an automobile as an ordinary man would drive it.

A. Yes, sir; about his trade.

Q. Doing business in the usual and ordinary way of a usual and ordinary man?

A. Yes, sir.

Q. Aside from the contact with him in the Myers incident, did you have other contacts with him?

A. Not with him.

Q. You never saw him other than that?

A. Oh, yes, on several occasions.

Q. He was going about his business as an ordinary man?

(Testimony of R. M. Pugmire.)

A. Yes, sir, except on two occasions he wasn't.

Q. When was that and what was that occasion?

A. In the latter part of '43—no, it was the latter part of '42.

Mr. Merrill: I move that be stricken as it is after the happening of the event here.

The Court: Yes, it may be stricken, but it was in answer to your question.

Q. Mr. Pugmire, your answer touching his reputation is based upon the Myers incident?

A. Not entirely.

Q. It is the principal thing? [363]

A. I would think so.

Q. That is the only thing wrong with his driving of an automobile in this locality?

A. No, sir.

Q. What else?

A. I heard considerable talk about Mr. Hair up at Dubois, Idaho, while I was with the F. B. I.

Q. You heard of a Dubois incident and the Myers incident?

A. It was spread over a period of time.

Q. The Dubois incident and the Myers incident? A. And the one at Montpelier.

Q. The one at Montpelier is the one we are trying here. A. That's right.

Q. The Dubois incident and the Myers incident happened about the same time in the early part of 1939? A. I think that's right.

Q. You never heard anything about his driving an automobile on any other occasion?

A. I don't understand your question.

(Testimony of R. M. Pugmire.)

Q. You have not heard anything bad about his driving automobiles on any other than those three occasions? A. That's right.

Q. You are basing your reputation,—strike that,—you are basing your conclusion that his reputation was bad on those three incidents?

A. No, sir. [364]

Q. Have you heard anything else?

A. I have heard the comment of other officers.

Q. All the information is from officers?

A. That is right.

Q. You don't have the information from the general public? A. No, sir.

Q. You never heard anything from the general public touching the fact that Hair was a drunken, incompetent and reckless driver?

A. Not that I recall.

Q. You have no information from the public at large that would lead you to testify as you have this afternoon? A. That's right.

Q. You never advised anyone that you had such information? A. No, sir.

Q. You never commented on it?

A. Yes, I have commented on it.

Q. Just at the time of the trial? A. No.

Q. And to Mr. Davis?

A. I have commented.

Q. But the fact is that you base your knowledge or your statement upon these three incidents, the one at Montpelier, the Myers incident and the so called Dubois incident? [365]

(Testimony of R. M. Pugmire.)

A. That is not a fact.

Q. You say they are not the facts?

A. They are not the facts.

Q. Then, Mr. Pugmire, what are the facts?

A. I have heard him discussed by many officers.

Q. What have you heard as to his incompetent driving?

A. None that I recall specifically.

Q. Then you must base it on those three instances?

A. And conversation I have had with other officers.

Q. Just rumor? A. Possibly.

Q. You have no knowledge and no information from anybody other than what officers could have said?

A. I think that is right.

Q. Mr. Pugmire, are you a member of the National Safety Council?

A. Yes, sir.

Q. Do you know that they give awards for careful driving?

A. Yes, sir.

Q. Members of your Police Department go to the conventions of the National Safety Council?

A. I think the Chief of Police attended that convention.

Q. You say that you know the Safety Council gives awards for careful driving?

A. Yes, sir.

Q. Do you know what requirements are necessary before a man will be awarded such an award?

A. I am not familiar with all the details of it.

Q. He must be a careful and competent driver?

(Testimony of R. M. Pugmire.)

A. Yes, sir.

Q. Or he is not awarded?

A. It is based on reports.

Q. Reports on the man? A. Yes, sir.

Q. State associations send reports to the National Association or the National Council?

A. The Police Departments may be members of the National Safety Council, but I don't know of any Department outside of Boise who are such members of the National Safety Council. Whether the City of Boise Police Department has ever sent in reports, I don't know.

Q. You know generally the theory of the National Safety Council, what it does, generally?

A. Yes, sir.

Q. What does it do with reference to drivers? What is the theory of the Council?

Mr. Davis: Objected to unless there is some purpose that I don't understand. It is incompetent, irrelevant and immaterial.

The Court: The objection is sustained at this time, I don't see its competency.

Q. You know that the National Council gives awards only to men [367] who are competent drivers and who are so reported?

A. Yes, sir, so reported but not proven.

Q. It is an honor conferred upon an individual because of reports that the National Council gets.

A. Yes, sir.

Mr. Merrill: That is all.

(Testimony of R. M. Pugmire.)

Redirect Examination

By Mr. Davis:

Q. Rumors and hearsay came to you concerning Mr. Hair's driving, now, are those the things you based your opinion on? A. That's right.

Q. Then you based it on other matters that came to you outside of these accidents, is that correct?

A. That is correct.

Q. Did you get numerous reports from Police Officers concerning this man's activities that caused you to form your opinion that he had such a reputation?

Mr. Merrill: Objected to as leading and incompetent, Mr. Davis has used language that is not proper in asking a question of that sort.

The Court: Possibly it is leading but otherwise it is competent. I will sustain the objection on the ground that it is leading.

Q. Tell us the other matters that came to your attention that caused you to form your opinion which you have expressed here. [368]

Mr. Merrill: We object to this unless it is restricted to improper driving.

Mr. Davis: Certainly it is restricted to that question.

The Court: As to his general reputation in this regard.

A. In addition to hearing at various times Mr. Hair discussed with respect to the three accidents

(Testimony of R. M. Pugmire.)

mentioned, I have heard officers speak of Mr. Hair and his driving and his continuing to drive after it had been shown that he was that kind of driver.

Mr. Merrill: Objected to as incompetent for any purpose and move to strike the answer.

The Court: It may be stricken.

Q. In answering that you said "continue to drive", drive in what condition

Mr. Merrill: We object as incompetent, irrelevant and immaterial, and it is repetition and the answer was stricken.

The Court: He may answer.

A. As a careless and reckless driver.

Q. You mentioned two occasions that you saw him, but I don't think that you completed your answer. Were those occasions at a time when he was driving the Reynolds Tobacco Company [369] truck? A. He was.

Q. Was what you saw on those occasions in addition to those other things that caused you to form your opinion that he was a reckless and incompetent driver?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained. It is not a question of his opinion.

Q. What you saw at that time, did you take that into consideration in forming your opinion as to what his general reputation was?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

(Testimony of R. M. Pugmire.)

The Court: I think he has answered the question. It is a question of what he has heard, I don't think he should be permitted to testify as to his own personal opinion.

Mr. Davis: That is all.

Mr. Merrill: That is all. At this time we move to strike the testimony of Mr. Pugmire and all of it touching the general reputation of Mr. Hair as a drunken, reckless, careless, negligent or incompetent driver upon the ground and for the reason that it is based merely upon rumor and upon three incidents only, and [370] which incidents in and of themselves would be utterly impossible to connect up in any way in this case. One of these instances being the case which is being tried here, and upon the further ground that the witness does not purport to give the general reputation. He was very specific in saying that the only thing he ever heard was from the police or officers and not the general public.

The Court: I think he also testifies as to rumors and I understand that general reputation is more from rumors than anything else.

Mr. Merrill: But rumors are not sufficient to take into consideration in passing upon, or basing an opinion as to general reputation or in forming an opinion as to reputation.

The Court: But rumors can be taken into consideration along with other matters. I will reserve my ruling on this question.

Mr. Merrill: May I have this further objection touching the motion to strike, or rather the further ground for the motion; that there is no proof of any kind or character that any of the matters or things testified to by him came to the knowledge of the defendants or either of them.

The Court: Yes, you may make that addition.

SID CLOSE

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Sid Close.

Q. Where do you live? A. Dubois.

Q. That is in Clark County, Idaho?

A. Yes, sir.

Q. What is your business? A. Sheriff.

Q. How long have you been Sheriff of Clark County, Idaho? A. Six years.

Q. Do you know Rulon D. Hair?

A. Yes, sir.

Q. How long have you known him?

A. I think the first day, or the first time I saw him was back in either 1937 or 1938.

Q. Did you have occasion to observe him or to watch him in your locality? A. Yes, sir.

(Testimony of Sid Close.)

Q. Taking the year 1939, Mr. Close, did you see him in Clark County that year? A. Yes, sir.

Q. What kind of conveyance was he driving?

A. A panel truck.

Q. Do you recall anything on the truck?

A. Yes, sir, advertising of Reynolds Tobacco Company.

Q. Did you see him in 1940 in your county?

A. Yes, sir.

Q. And in 1941, did you see him in Clark County? A. Yes, I saw him in 1941.

Q. Was he driving the truck at this time?

A. Yes, sir.

Q. In 1939 when you saw him did he have a passenger with him? A. Yes, sir.

Q. In this truck? A. Yes, sir.

Q. Did you know the passenger?

A. No, sir.

Q. Was it a male or female? A. Female.

Q. How many times did you see him in that county with a female in that panel truck?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

Mr. Davis: I will reframe the question.

The Court: Very well.

Q. How many times did you see this man in that county with [373] a passenger in the truck?

A. Five or six times.

Q. Would the passengers be men or women?

A. Women.

Q. Was it the same one or different ones?

(Testimony of Sid Close.)

A. Different ones.

Q. Did you have occasion to observe Mr. Hair's actions in your county? A. Yes, I did.

Q. I will ask you if you know what his general reputation in your community was during the years 1939, 1940 and 1941 for being a drunken and reckless driver or a sober and careful driver, do you know what that was, just answer yes or no?

A. Yes, sir.

Q. What was that reputation?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation is laid and is furthermore wholly incompetent and it does not prove nor is it an attempt to prove any allegation of the complaint.

The Court: Has it been testified in this trial that Dubois was in Mr. Hair's territory or Mr. Donnelly's territory?

Mr. Merrill: That would be wholly immaterial.

Mr. Davis: I will ask permission to withdraw [374] this witness and recall Mr. Donnelly for further cross examination under the rule.

The Court: You may do so.